SUMMARIES OF PAPERS

ON

PROBLEMS OF FEDERAL-PROVINCIAL RELATIONS

VOLUME I

PREFACE

This is a collection of summaries of important papers on federal-provincial relations which have already been distributed to the Ontario Advisory Committee on Confederation. At the suggestion of the members of the Committee, it was prepared by the Economics Branch of the Department of Economics and Development. The summaries are divided somewhat arbitrarily into two main divisions, those dealing with papers on the constitutional, political and cultural aspects of problems of confederation and those dealing with the fiscal, financial and economic aspects of problems of confederation.

It is the intention of the new Federal-Provincial Secretariat of the Office of the Chief Economist to expand the collection as more papers are received. Consequently, it is hoped that they will provide a condensed view of current literature on problems of federal-provincial relations.

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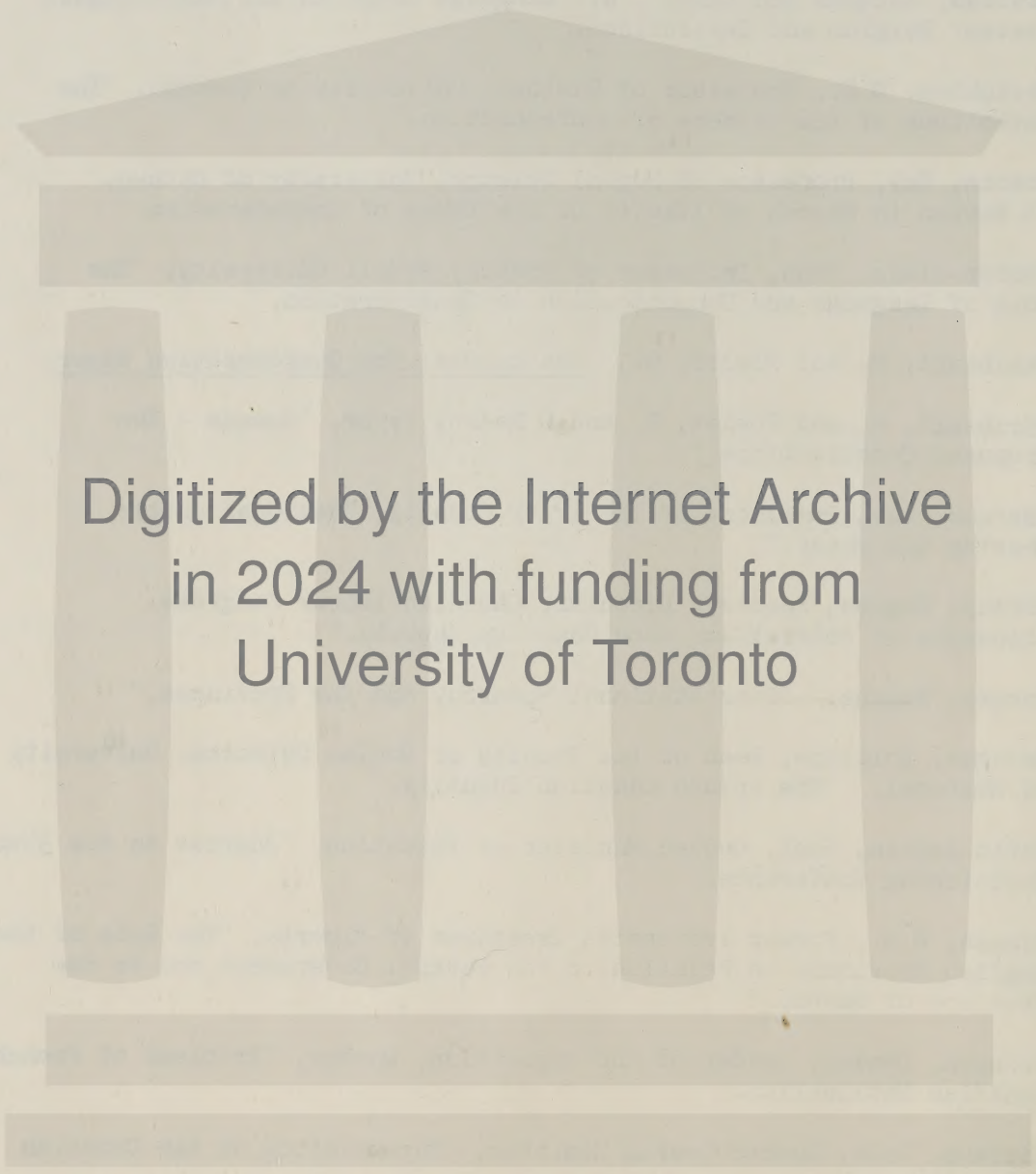

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Language Usage in two Multilingual States: Belgium and Switzerland *

The Land and the People

Belgium and Switzerland are both very small in area. Belgium has a population of 9 million and Switzerland 5½ million.

Belgium has two major language groups, the Dutch-speaking Flemings and the French-speaking Walloons. Centuries of intermarriage between Flemings and Walloons give most of them a common ethnic origin. Switzerland recognizes four languages -- German, French, Italian and Romansch. In Belgium the Dutch-speaking region includes 50 per cent of the population, the French-speaking counts 35 per cent; the remaining 15 per cent is located in Greater Brussels but most of the Bruxellois are French speaking by background or preference. In Switzerland, almost 74 per cent of the population is German speaking; 20 per cent French speaking; 4 per cent Italian and 1 per cent Romansch. The German speaking group speaks 26 different dialects so it is less of a threat to the other groups.

In Belgium the Flemings have never been a numerical minority but because of the early industrialization of the south and the dominance of the French language throughout the country, they have been a socio-economic minority. Now, however, positions are being equalized. In Switzerland the French and German Swiss enjoy the same high standards. Disparities are greater within each linguistic group than among them. Italian Switzerland, however, is poor by contrast. In both countries French has enjoyed a certain prestige so that the German Swiss and the Flemings have learnt the language. However, in Belgium the position is now being reversed and the Flemings are acquiring a new status for Flemish.

*The paper on Belgium was prepared by Jacques Brazeau, Director, Department of Sociology, University of Montreal, for the 1965 Couchiching Conference. Switzerland: Example of Cultural Coexistence is by Kenneth D. McRae, Professor of Political Science, Carleton University, Ottawa, who is currently working for the Royal Commission on Bilingualism and Biculturalism.

Language Practices

Belgium is in fact a unitary State which comprises nine provinces with little political autonomy. Switzerland is a federation of 22 cantons which are autonomous in all matters except those delegated to the federal government. Both Belgium and Switzerland follow the principle of territorial unilingualism. In Belgium the four northern provinces recognize Dutch as their language, and the four southern provinces French. The central province, Brabant, is divided so that the northern half is Dutch and the southern half French. Brussels is officially bilingual. In Switzerland, three cantons are bilingual in French and German and one is trilingual in German, Italian, and Romansch. Three cantons are officially French speaking and one Italian. The remaining 17½ cantons are German speaking. In both Belgium and Switzerland, the frontiers between the language groups have changed very little in the past 100 years.

Belgium passed new language laws in 1962-63 which fixed the frontier between the Flemish and Walloon regions. Bilingual services were made mandatory within the 19 communes of Greater Brussels; only six surrounding communes were allowed to offer school facilities and translations of public documents to their French-speaking inhabitants upon request. Belgium also created a permanent commission accountable to parliament, to supervise the application of language laws throughout the country, to receive complaints regarding breaches and to advise on all language matters.

In Switzerland the three official languages, German, French and Italian have equal standing in the parliamentary, administrative and judicial spheres of the federal government. Any canton or linguistic area has the

right to preserve and defend its own linguistic character against all outside forces. In the case of bilingual cantons there is an attempt towards equality between the cantonal languages.

The Public Service

In Belgium parity of representation in the central administration has been accepted. In 1932 the Flemings felt that they were deprived of jobs in the higher grades because French speaking Brussels did not welcome them. Since then laws were made which greatly helped their position. Now, upper grade positions are assigned to each group on an equal quota basis. Bilingualism is not required for either Dutch-or French-speaking civil servants. Each is assured by law of the privilege of working in his own language and of being addressed in his own language by his superiors. However, lower grade civil servants in direct contact with the public have to meet dual language requirements to serve in Brussels. Flemings have refused monetary inducements to bilinguals but they have agreed to do their written work in Dutch and converse in French with their colleagues and superiors "when in the mood to do so."

Recent laws specify that the language of higher studies pursued determines allotment of a candidate to one side of the language line and this allocation is permanent. Thus bilinguals cannot change their linguistic identification in order to seek available jobs that are not in their group. Whereas French was the language of the civil service at one time, today two languages are used on an equal basis. French is used more than Dutch in

small conferences or committee work because many Walloons do not understand Dutch. At large gatherings simultaneous translation is available. Although higher officials in both groups are bilingual, they are in a social situation where they use their own language as a working language. The Flemings had been in the position French Canadians in Canada are in now, but conditions have changed in Belgium.

In Switzerland conditions are slightly different. For personnel working in the central administration at Bern at least two official languages are required. However, as is the case in Belgium, officials may work in whichever language they choose. Divisional heads and their deputies are responsible for developing accurate texts of departmental documents in their own mother tongues. Although German and French get enough recognition, Italian tends to be a language of translation rather than a working language because relatively few civil servants understand Italian.

Until recently the French Swiss were under-represented in the highest offices of the public service, but now preference is given in appointments or promotions to French or Italian Swiss, other things being equal. In recruitment for decentralized services the language qualifications are less rigorous.

Military

Laws were passed in Belgium in 1928 and 1938 which adopted as principles the training of troops in their own language, French, Dutch and even German for the conscripts of Belgium's eastern townships. The same principle is followed in Switzerland. Army units are formed from men of

the same canton to facilitate communication. In both countries officers are obliged to be bilingual or plurilingual. In Belgium there is proportional representation of the two main language groups among officer-candidates.

Education

In Belgium no second language requirements are compulsory in the Flemish and Walloon regions. Instruction in a second language is given only in high school and then too as an option among modern languages. However, all schools in Brussels impose second language instruction now in early elementary grades. In Switzerland, a second national language is compulsory in secondary school. In bilingual cantons two state systems exist side by side to accommodate different language groups. Subsidies are given to cantons which have minority groups because these groups find it harder to get textbooks and well-trained teachers.

Conclusions

In both countries an attempt is made to run a modern industrial state without taking away any minority rights. In Belgium, the two language groups are almost equal in population so the compromise was a political inevitability. In Switzerland, however, it is remarkable to see the concessions given to minorities and one wonders whether this has been possible because of Switzerland's unique geographic conditions, her non-involvement in world affairs, and the fact that she is reasonably close to Germany, France and Italy. Both the studies on Belgium and Switzerland see the value of unilingual states or provinces in preserving minority languages. Both studies praise the efforts made to let each group use its own language, but neither

study elaborates on the disadvantages or inconveniences of such a system. Professor Jacques Brazeau, who wrote the case study on Belgium, would like to see suitable linguistic arrangements made for the French Canadians in Quebec and in other provinces.

D.G. Creighton, "The Intentions of the Fathers of Confederation."*

D.G. Creighton's thesis is that the intentions of the Fathers of Confederation are being seriously distorted by Quebec's "quiet" revolutionaries. These people are using the sophisticated revolutionary approach to history, which tries to discover in the past a new meaning which will justify the demands of the moment. The search for the "real meaning" in history is just another way of stating revolutionary demands.

The Fathers of Confederation wanted a parliamentary form of government on the British model. They would have preferred a legislative union, but were forced to accept a federal union. A federal union was regarded with suspicion because the only precedent for one was the United States and there the threat of a Civil War was apparent. The solution to this conflict lay in the "Great Compromise of Canadian Confederation." Canada was to be a federal union but residuary powers were given to the central government. The British North America provides for the use of the French language in Parliament, in the courts of Canada, and it provides safeguards for established sectarian schools of religious minorities. It does not, Creighton emphasizes, declare Canada a bilingual or bicultural nation. The main aim of Confederation was not to solve the Ontario-Quebec problem, but to form a transcontinental nation. The rule of the Civil Code and the use of the French language were confirmed in those parts of Canada in which they had already been established.

Since 1867 two tremendous changes have taken place. Firstly, the balance of power has swung to the provinces. Secondly, Quebec has claimed a distinct character and a special status in Confederation. However this latter change which is part of the quiet revolution is now confronted by the legal barriers in the B.N.A. Act, the historical memory of the aims and purposes of the men of 1867, and the inherited conviction that radical changes might

* Champlain Lecture, Trent University, Fall 1965.

perilously weaken the fabric of our federal union. If the revolutionaries are to succeed, they must overcome these obstacles, silence these fears, and eradicate these inhibitions.

In their attempts to devise ways and means to carry out radical changes the revolutionaries are attempting to either reject the B.N.A. Act as obsolete or to read new meanings into it.

Both arguments have been used to support the change. It has been argued that the Fathers of Confederation could not foresee the modern welfare state, and thus greater provincial authority is needed to provide welfare needs. Creighton argues that the Fathers certainly made provision for a welfare state by asking for a strong central government. The only reason that provinces have greater power is that it has been arbitrarily given to them by courts, the Judicial Committee of the Privy Council, and by politicians. The huge increase in the provincial share of the public sector of the economy could be dangerous in the future because it might lead to a breakdown of the federal government's monetary and fiscal control as well as common minimum standards of public services and welfare, which most people believe a nation ought to try to achieve.

It has also been argued that Confederation was a moral commitment between two cultures. The two nation theory can go to extremes in justifying equal representation for French and English speaking Canadians. Creighton argues that bicultural provisions were never made in the West in the late nineteenth century.

The theory of natural decentralization and the theory of Confederation as a bicultural agreement are both against the intentions of the makers of Confederation. Creighton warns against attempts to drastically reinterpret history because "A nation that repudiates or distorts its past runs a danger of forfeiting its future."

Guy Dozois, "A Nation in Search of Itself:
or the Bases of Confederation."*

Guy Dozois makes a strong appeal to wake up English Canadians to the fact that for a number of reasons, Quebec is getting "fed up" with explaining its position. First, the more Quebec explains its position, the less English Canadians understand it. Secondly, Quebec is beginning to feel like a prisoner asked to defend himself before a tribunal. Thirdly, it simply is not easy to explain French Canada's position or to state what it wants in a clear and precise fashion.

Before one asks what French Canadians are seeking one must ask what they actually are.

What Quebec Actually Is:

It is time that English speaking Canadians got rid of their prejudices that Quebec is a priestridden province and that the French Canadians are fit for medicine and law, but not for big business. A quiet revolution has taken place in Quebec since the death of Maurice Duplessis in 1959. The defeat of the Union Nationale in 1960 and the election of the Quebec Liberal Party marked the beginning of a new era. French Canadians became conscious of the power of the state and started asking for state intervention in community life. The result was the nationalization of electricity in Quebec in 1960 and the establishment of new ministries and councils to further development.

These changes have completely transformed Quebec's traditional society. They have also brought the realization that the Government of Quebec needs more power to fulfil the demands made upon it. The French Canadian, today, is not the same person he was 10 years ago. English Canada

* Presented to the National Conference on the Problems of Canadian Unity, Banff Centre for Continuing Education, June 22, 1964.

must accept these changes because of the profound implications they have on English-French relations and on Federal-Provincial relations.

The French have had sufficient reason to complain. First, their interests were totally ignored in the Conservative era from 1957-1962. Secondly, they do not have adequate representation in government or in the public service; the public service still remains unilingual. Thirdly, the rights of the English speaking minorities in Quebec are dutifully guarded, but the French minorities in New Brunswick, Ontario, Manitoba, Saskatchewan and Alberta have been ignored. French Canadians do want a federal union but they definitely do not want one where they feel like second class citizens.

In short, English Canadians have been indifferent to the new and changing Quebec. They have not moved to sincerely help Quebec in its own efforts to boost its stakes in Confederation. English Canadians have in fact helped Quebec but only because they thought they had no other choice and even then, they ceded the least possible.

What Quebec Wants:

What Quebec wants is to be accepted as it is now and not as it was 10 years ago. English Canada must learn to live with the Quebec of 1964 or to live without it. Quebec wants the right and means to determine her own destiny. This necessitates a change in the taxation procedure. The provinces need more revenue to provide all the services. Shared-cost programs should be abolished and the provinces should be given access to the sources of taxation. Quebec demands that the Constitution be Canadianized

or repatriated. It also wants the revision procedure to protect the rights of French Canadians. The Civil Service must become bilingual and the rights of the French minorities must be protected.

The Constitution as it stands must be changed. "To what extent? As yet we do not know," says Dozois. Biculturalism should mean binationalism. He urges English Canadians not to be indifferent, for indifference drives French Canada to separatism. He concludes with a warning that Quebec's problems must be on a way to solution by the Centennial year, 1967.

Professor Jean Ethier-Blais, "The Role of Language and Communication in Confederation"*

Professor Jean Ethier-Blais feels that, the dynamics of history are such that for a people, bilingualism can be but a transitory phase; in the end one language is bound to disappear. The history of the French language in Canada is one of slow decline. The dilemma which French Canadians have to face is not whether bilingualism should go on flourishing in Quebec, but whether it is still possible to retain French as a national language. As a consequence of the impetus of current developments in Quebec that province will eventually be forced to adopt the status of a unilingual province despite the constitutional risks.

Up to the end of the last war, French Canadians took it for granted that they would, as it were by divine right, survive as a French nation in Canada and America. It is this belief which has been shattered since then. Since the war French Canadians have discovered that the quality of their language had eroded and that France is not the only French-speaking country in a world outside Canada. Thus the French Canadians have recognized the necessity to change their language in depth and, at the same time, they have recognized the profound meaning of French culture and the genius of the French language throughout the world.

In short, French Canada has at last entered the twentieth century to the great surprise of English-speaking Canada. The surprise results from the lack of understanding on the part of the English-speaking Canadians and also on the frequent failure of French Canadians to translate their sensitivity

* This paper was presented to the National Conference on the Problems of Canadian Unity at Banff Centre for Continuing Education, June 22nd to 24th, 1964. The author is a professor in the French Department of McGill University.

to their own culture, at the official level, into policy. Professor Ethier-Blais feels that the French Canadians were insecure of their own culture and therefore accepted the distorted image of it which the English Canadians forced upon them. As a consequence political dialogue between French and English Canadians was always at cross purposes because one of the speakers (i.e. French Canadian) was always on the defensive, trying to convince the other instead of explaining a given situation in terms of his own true cultural outlook. Political communication should be a cultural phenomenon based on a parity of expression. (Ethier-Blais tends to identify culture with language). The problem of language in Canada can only be settled with the other pending issues between English and French-speaking Canadians. These issues will mainly involve agreement with the other provinces.

The status and development of the French language in Canada has created many problems for the French Canadian.

First, any Canadian who aspires for national responsibility has to speak English. This means that all matters of national interest have to be approached from an English viewpoint. It also means that all Canadians are unilingual and English. A French Canadian civil servant will at some stage automatically think in English. When he does so, he will become a devaluated person from a cultural viewpoint because he will be at ease in both languages but he will be at ease on an inferior level. Thus the unilingual French Canadian is useless outside Quebec and the bilingual French Canadian is a devaluated person. Quebec today, is trying to revitalize the source of its culture, the French language, and to get it recognized outside Quebec.

Secondly, most French Canadians who speak both languages are superficially bilingual for they are unable to speak in depth in any language. Moreover the French spoken in Canada has borrowed heavily from English so

that even at the highest literary level it is contaminated. In Quebec, today, it is becoming easier to learn English and harder to preserve French. The English-speaking minority in Quebec assimilates more immigrants than do the French-Canadians themselves. Unilingualism is, thus, the only radical solution which can reverse the present trend towards an ultimate preponderance of English in Quebec.

Thirdly, French Canadians now realize that France is not the only French-speaking country in the world. Their cultural confrontation with international French has made them realize that they have to change their language in depth.

The decline of French language could be stopped if all the provinces adopted laws to protect the rights of French minorities in their provinces. Ethier-Blais does not feel, however, that the provinces will make any changes favorable to French. He urges politicians to take action and impose solutions from above for Quebec's problems. It is too late to solve the problems within the framework of public opinion.

M. Faribault and R. Fowler, TEN TO ONE: The Confederation Wager*

The proposed Canadian Constitution is an unpretentious, precise constitution which tries to put into words most of the traditions and patterns already followed by Canadian Government. It does not propose any drastic changes like the abolition of the Senate, but it does give considerable power to the provinces.

The changes which are recommended seek to give greater powers to the provincial governments. The BNA Act has always been called quasi-federal, and this constitution, perhaps, aims at being a truly federal one. It does not give residuary powers to the federal government and it takes away the federal government's power of disallowance of provincial legislation (The latter power has not been used for the past 25 years anyway). It gives the provinces greater powers of taxation with a view to equalizing revenues and responsibilities. It also allows provinces to enter into agreements with foreign powers to the extent that they can give economic aid to other countries. The provinces have the powers of a "state to deal with other states, save in the matters and powers conferred exclusively to the Federal Government." Thus the balance of power strongly favors tne provinces.

An interesting feature of the constitution is tnat it does not mention the monarchy at all, although there is to be a Governor General who will act as head of state. The constitution includes a Bill of Rights, and provisions for a flag and a national anthem.

The fundamental rights to be given are rights which are already enjoyed by Canadians. There shall be no arbitrary detention, imprisonment or exile. Citizens will have freedom of movement, education, professions,

*Marcel Faribault is president of the Trust Général du Canada and former Secretary-General of the Univeristy of Montreal. Robert Fowler is president of the Canadian Pulp and Paper Association and the Newsprint Association of Canada and a member of the Economic Council of Canada.

religion and communication. An additional right guaranteed is for the use of either of the two official languages where the last census has shown that a minority of at least 20 per cent has declared one of said languages to be its maternal or official one. Instruction in the two official languages will be obligatory, either as a principal or secondary language. The purpose of the "Fundamental Rights" the authors claim, is to help identify Canada's accepted ideals of personal liberty. Many Canadians come from countries where English constitutional usages and conventious are unknown, and thus there must be education in Canadian ways and traditions.

The Governor General is to be appointed for seven years by an order-in-council of the Federal Government. His duties are the same as they were under the BNA Act. He must be a Canadian citizen by birth, and at least 50 years old. As regards the monarchy, the authors feel that Canadians should make a compromise and respect the feelings of those Canadians who wish to retain the monarchy.

Several changes are proposed in the Senate. (1) the number of senators is reduced to 96 from 102 (2) Senators must be not less than 35 years old and not more than 65 and they must retire at 75. (3) there shall be a change in the method of appointment so that all appointments are not from the same political party. Vacancies in the Senate are to be filled alternately by the provincial Governor-in-Council where the vacancy occurs and by the Governor-in-Council of the federal parliament (4) the Senate will be given more work. It will supervise public corporations, boards and commissions, whether advisory, of inquiry or administrative.

The Supreme Court shall have one third of the number of justices from Quebec. There, the constitution merely sanctions what is true by convention. In order to better provide justice for Quebec, there is a clause that if there is an appeal from the courts of Quebec in matters of civil, municipal, school or parish law procedure, the panel will be composed of Supreme Court judges from Quebec supplemented by ad hoc justices from the courts of Quebec. Provincial justices shall be appointed and paid by the provinces rather than the federal government. The argument for this is that the provincial executive is in a better position to select competent judges from the local bar than the federal government. Another provision made in favor of the provinces is that in dealing with constitutional references the tribunal shall consist of both the justices of the Supreme Court and the Chief Justices of the provinces. This will ensure that the provinces have a definite voice in any interpretation of the new constitution.

There are not many changes in the distribution of powers between the provinces and the federal government. Marriage and divorce are put under provincial jurisdiction. Savings banks are put under provincial control too. The responsibility for the support of "people of any ethnic origin" is to be shared by both governments. (Formerly this was under federal jurisdiction.) Also under concurrent powers is social welfare and assistance, including family allowances and old age pensions.

The federal government and the provinces may levy money by any mode of taxation. The only restriction is that the federal government may not tax real estate and the provincial government may not levy import-export taxes. A fiscal commission, composed of 12 persons, four appointed by

the Federal Government and two each from the Atlantic Provinces, Quebec, Ontario and the Western Provinces shall make recommendations as to the rate of taxation. This might produce some conflict.

The Constitution provides for an Economic Development Bank to aid in the development of impoverished regions. There are to be no residuary powers. If new subjects emerge, then there should be a constitutional amendment to decide in the specific case how the subject should best be handled.

The proposed constitution ends with an amendment procedure. For a few minor subjects there must be approval from two thirds of the provinces representing a 50 per cent population. For other matters like the role of the executive and legislature there must be approval by two thirds of the provinces representing a 75 per cent population. In matters relating to fundamental rights, amendment of the constitution, and distribution of revenues approval from all provinces is essential. The amendment procedure seems similar to the Fulton-Favreau formula.

Although the constitution makes no specific reference to any province, it seems likely that, if put into effect, it will aid Quebec in achieving most of her objectives. The provinces are given enough power to assert their identity, not only in Canada, but in other countries too.

Canada - Two Proposed Constitutions*

The two proposed constitutions attempt to regulate the powers and responsibilities of the two levels of government in such a manner that they might meet present requirements. The Faribault-Fowler constitution makes a rigid separation of powers and then proposes a system whereby provinces can get more taxes to pay for the services they provide. O Hearn's constitution makes all powers, in effect, concurrent powers and it leaves a great deal of flexibility as to the percentage of responsibility each government will share. The Federal Council proposed by O Hearn, is to determine the rates of taxation. The Faribault-Fowler constitution is more definite in giving the provinces greater power because firstly it takes away the federal government's right of residuary power and secondly it gives the provinces the powers of a "state to deal with other states, save in the matters and powers confined exclusively to the federal government". O Hearn's constitution does not specifically favour either level of government and it is so flexible that the balance of powers could sway either way.

Both constitutions propose that the federal and provincial governments may levy money by any mode of taxation. O Hearn also proposes that the central government give subsidies to needy provinces. A minor point in the Faribault-Fowler constitution is that the federal government may not tax real estate and the provincial government may not levy import-export taxes. There shall be a fiscal commission (Faribault-Fowler) or a federal council (O Hearn) representing both levels of government whose task it shall be to allocate the revenues. The fiscal commission composed of 12 persons,

*A comparative summary of two books, Peace, Order and Good Government,(1964), by Peter J.T. O Hearn and Ten to One: The Confederation Wager (1965) by Marcel Faribault and Robert M. Fowler.

four appointed by the federal government and two each from the Atlantic Provinces, Quebec, Ontario and the Western Provinces shall make recommendations as to the rate of taxation. The federal council shall be composed of one member from each province and delegates from the central government, not exceeding in number the provincial delegates. Before any rates are determined, the majority of delegates from the government and from the provinces representing a majority of the population of Canada must concur. These commissions could produce some conflict especially in O Hearn's constitution where the provincial responsibilities are 'dominant' rather than 'exclusive'.

Both constitutions list fundamental rights, which are rights already enjoyed by most Canadians. Ten to One guarantees the use of either English or French where the last census has shown that a minority of at least 20 per cent has declared one of the said languages to be its maternal or official one. Instruction in the two official languages is to be obligatory, either as a principal or secondary language. O Hearn guarantees the use of French in all provincial legislatures and courts. Both constitutions would like to retain the office of the Governor General although O Hearn suggests that he be either appointed or elected. Both constitutions respect the monarchy although the Faribault-Fowler constitution makes no reference to it.

The present Senate comes under the criticism of both constitutions. The method of senatorial appointments should be changed and senators should be given more work. Faribault-Fowler suggest that vacancies in the Senate be filled alternately by the provincial Governor-in-Council where the vacancy occurs and by the Governor-in-Council of the federal parliament. This would reduce political patronage from the centre. O Hearn would like a Senate that

is representative of provincial interests. He suggests that an equal number of senators represent each province; preferably nine from each province. The system of senatorial appointments should be changed so that two thirds of the senators are elected or appointed by each province and the rest appointed by the federal government. The provincial senators might be elected by dividing each province into senatorial districts, each of which would elect a senator at every national election. This system has merit although Quebec might object because its representation would be greatly reduced.

Both constitutions suggest that provincial judges be appointed and paid by the provincial governments and not by the federal government, although O Hearn says that such appointments may be disallowed by the federal government. The justification for this is that firstly the provincial executive is in a better position to select competent judges from the local bar and secondly it would eliminate political appointments by the federal government. Faribault-Fowler specify that three of the nine supreme court judges are to be from Quebec. They also provide a clause that in certain matters concerning Quebec law the panel will be composed of supreme court judges from Quebec supplemented by ad hoc justices from the courts of Quebec. Another provision made in favour of the provinces is that in dealing with constitutional references the tribunal shall consist of both the justices of the supreme court and the Chief Justices of the provinces.

Neither constitution suggests major changes in the distribution of powers, although as already pointed out, O Hearn makes all powers concurrent. Both constitutions put "Marriage and Divorce" under provincial jurisdiction.

Both constitutions have relatively simple amendment procedures. Both agree that articles on fundamental rights can only be amended if all

the provincial legislatures ratify the amendment. Other articles may be amended by the approval of two thirds of the provinces representing a 50 per cent population in some cases and a 75 per cent population in others. The amendment procedure is a simplified version of the Fulton-Favreau formula.

Guy Favreau, "National Unity: Meaning and Means"*

National unity can only be achieved in Canada if every Canadian recognizes the right of others to be different. There is no typical Canadian because there is no typically Canadian emotion towards Canada.

In this somewhat sketchy speech, Guy Favreau tries to justify cultural dualism in Canada. He begins by saying that Canadians must abandon the idea of a monolithic society because even among "English-Canadians" there are many differences. Favreau would like to see a multi-cultural society in a bicultural state. The historical date at which a cultural group arrived in Canada should not confer a privileged status on that group. Nevertheless, if - as it is the case in Canada - one or two peoples manage all alone over a fairly long period to give a country undeniable prosperity and stability, the higher interest of all the peoples who come thereafter is to participate in the already proven structure. Therefore, Canadians should be allowed to express themselves within the organs of government through the two mainstreams of their country, English and French.

Dualism is a great asset to Canada in international affairs because she can communicate in two important languages. At home, this same diversity strengthens Canada because it enables the many groups to communicate through two representative world languages. Moreover, dualism forms an effective bulwark against the pressing tendency of the United States to absorb Canada. Favreau does not give a convincing argument to support this statement.

Canada should accept official bilingualism as a positive vehicle and make the whole federal administration an authentic reflection of her two main cultures.

* This paper was presented at Minaki Lodge, Minaki, before the Manitoba Bar Association on June 18, 1965.

Eugene Forsey, "Concepts of Federalism: Some Canadian Aspects"*

The problems of Canadian federalism are not really problems of federalism but of Canadian dualism. Every time the problem of the distribution of power between the Dominion and the provinces arises, the first question the French speaking population asks is, "will it better protect 'us' against 'them'?".

Eugene Forsey first examines the provisions made by the B.N.A. Act to safeguard French interests. He then describes the numerous changes which have taken place since confederation, changes which have resulted in a considerable gain in provincial power across Canada and the establishment of a strong Quebec identity with a consequent demand in that province for even wider powers.

This demand for wider powers has included a bid for more independence, outright independence, the division of Canada into two loosely associated states, and a suggestion that Quebec form an 'alliance' with the rest of Canada. The demand of the "non-separatists" has been for a complete revision of the constitution, or for a new constitution, giving Quebec inexhaustible power. Forsey has no sympathy for Quebec's demand for "an alliance". Better outright separation.

On the other hand he urges English Canadians to accept that Canada will never be a country of one language and one culture. The French language and Quebec Civil Law always have had and will have a special position in Canada. Secondly, Quebec has to be accepted as a special province, the "Citadel" of French Canada. Quebec's industrialization, its cultural

* This paper was presented at the Couchiching Conference, August, 1965.

renaissance and the extension of French Canada beyond Quebec all require adjustments to the Confederation settlement.

These adjustments include (1) the quickest and most complete bilingualization of the central administration; (2) official bilingualism in New Brunswick; (3) the same in local government wherever there is a sizable French speaking population; (4) French education for children wherever the parents want it. English speaking Canadians must be willing to discuss "specific" changes with French speaking Canadians. However, Forsey insists that they do not blindly concede to all the demands of the French speaking population. "Saying 'yes' to anything which a French Canadian says he wants is paying French Canadians a very poor compliment."

Quebec has had, and should have, certain rights which other provinces do not have and perhaps do not even want. Forsey urges that any proposals for a specific change in the constitution be examined on their merits and not just rejected on the ground that no province has a right to anything unless every other province gets it too. Finally, he hopes that in any constitutional discussions an attempt will be made to deal with specific, practical issues rather than abstract principles.

Eugene Forsey, "Constitutional Monarchy and the Provinces" *

Given that provinces are not themselves monarchies and that Canada is a constitutional monarchy by deliberate choice, Mr. Forsey asks, why do we hear so much talk of republicanism, both in French and in English Canada? Mr. Forsey suggests seven possible reasons or arguments, strategically ranked in order of the shallowness of their theoretical and factual underpinnings, for such talk. He then proceeds with great zeal to shoot down each argument.

He concludes that it is pointless on the one hand to tear up our roots (i.e. our constitutional monarchy) when on the other hand there is no strong argument in favour of the alternative, a Canadian republic. Mr. Forsey would like us to get on with the urgent political social and economic changes which Canada must make and quit wasting our time with changes which are not even necessary.

The arguments and counterarguments for a Canadian republic are presented as follows:

Argument (1)

Republics are once more in fashion, especially since the Second World War. No counterargument is presented.

Argument (2)

Some Canadians think that people who live in republics are freer than those who live in constitutional monarchies. This is a poor generalization; South Africans, Ghanians, Russians, Americans, etc. are not obviously freer people.

Argument (3)

Some think that a republic would be more truly "Canadian" whatever that means. Forsey thinks that as far as Canada is concerned, constitutional monarchy is "bone of our bone and flesh of our flesh" and therefore it is very "Canadian".

Argument (4)

For people of non-British origin monarchy is no part of their Canada. For

* Champlain Lecture, Trent University, Fall 1965.

French Canadians Forsey states that the monarchy is just as much part of their Canada as Quebec's Civil Law. Both were derived from Britain and France respectively. The acceptance of the constitutional monarchy in Canada by the ancestors of other ethnic groups is proof that it is part of their Canada. Moreover all groups have played a "distinguished part" in the working of Canada's explicitly British, monarchical constitution.

Argument (5)

Because some Canadians have an "amiable but fuzzy" desire to help the French-Canadian, they recommend a republic in Canada which they hope will solve the problem arising out of French Canada's position in Confederation. Mr. Forsey asks a long series of questions which imply that no one has shown how or why a republic would benefit French Canada at all.

Argument (6)

Some think that Canada really is and certainly ought to be a Second United States. This argument is labelled the "carbon copy" theory of Canada. A factual look at Canada's political and constitutional history indicates that this theory is indeed a wild misconception. In short the theory - and hence argument - is imaginary from a practical point of view.

Argument (7)

Parliamentary responsible government is a more dangerous system than the American system in the sense that the Crown must always follow the advice of the Cabinet in office at the moment, even if that Cabinet refuses to meet Parliament for more than the single sitting once a year that the law requires; or even if that Cabinet cannot muster a majority; or even if that Cabinet has just been resoundingly defeated in an election. This is labelled the rubber stamp theory of the Crown.

While the result that Governments would be irremovable except by their own consent or by force of arms is technically possible within the Canadian system,

our inherited sense of decency, fair play and responsibility (inherited from Britain along with the system of parliamentary government itself) and more importantly, the Crown which is the embodiment of the interests of the whole people preclude this result. If we abolished the Crown and substituted a national President and ten little presidents for the provinces, then either we should have to change our whole system of government and replace it by an American or Gaullist or Soviet or other totally alien system or we should have to give the presidents substantially the same powers as the Queen, the Governor-General and the Lieutenant-Governors now have. The former change is a violent break with our whole history. The latter poses two problems. First, the constitutional draftsman might end up by giving the head of state and his provincial counterparts either too much or too little power. Second, even if he succeeded in effecting an ideal balance of power he would have to devise a method of election which would provide some hope that the presidents would be reasonably impartial politically; no small task.

Philippe Garigue, "The French Canadian Identity"*

There are two main problems in the relationship between the English and French in Canada. First there is the constitutional problem of what kind of federalism should exist in Canada. Secondly, there is the structural problem which arises from the less privileged position of the French Canadians in Canada, and in Quebec, in particular.

The B.N.A. Act does not recognize the national existence of French Canada. The English Canadian concept of federalism has never gone beyond administrative decentralization and federalism in Canada has no real linguistic implications for English Canadians. As a result, French Canadians have been disillusioned by federalism and have looked upon provincial autonomy as the only solution to their problem of national identity. French Canada began to realize that its national aspirations could only be gained through strengthening the powers of the province. This realization gave birth to the idea that the Province of Quebec, was in fact, the "State of Quebec." As more and more French Canadians became conscious of their national status, they also desired increasing political independence.

Political autonomy and separatism have only recently become elements of the French Canadian identity. In the past, French Canada has always appealed to laws rather than to the use of revolutionary violence. New radicalism has entered the French Canadian national identity, and state sovereignty for Quebec is the major goal of many separatists.

The problem of national identity has also been intensified by the economic superiority of the English Canadian. The psychological consequences of being in a less privileged group have been that "national identity" has

*This paper was presented to the National Conference on the Problems of Canadian Unity at the Banff Centre for Continuing Education on June 22, 1964.

taken an undertone of protest. It has made the French Canadian unconsciously hostile and it has given him a desire to be different from the English Canadian.

Garigue concludes with two suggestions:

1. equalize political power and accept French Canadians as full partners in Confederation
2. transfer economic control from the English Canadians to the French Canadians in Quebec.

"Address by the Honourable Paul Gerin-Lajoie"*

The people of Quebec want a political and constitutional change which must become apparent in the power structure of Canada. They want a completely renewed approach by the rest of Canada based on the fact of Canadian dualism.

English Canadians must recognize that cultural dualism is not a divisive force or a bone of contention but must recognize that it is a cementing bond and that it is the most distinctive characteristic in our Canadian heritage.

Gerin-Lajoie says that the new Quebec has seen the emergence of self-identification and a sense of collective responsibility. Quebec feels it is responsible for two things. First, Quebec is responsible for seeing that Canada becomes a genuine fatherland to all Canadians. Secondly, it is responsible for preserving itself as a nation. Both these aims can be fulfilled within a Canadian federation, if certain changes are made. Therefore, English Canadians must accept the idea of a change for the better as progress and not as treason.

Consciously or unconsciously, many English-speaking Canadians fear that Quebec's current actions will lead to the balkanization of Canada. They must be thinking mainly of the balkanization of English-speaking Canada. But if they come to this conclusion they do so on the unrealistic premise that Quebec is merely a province "comme les autres". More autonomy for Quebec should not automatically mean an equivalent amount of autonomy for other provinces since other provinces don't have the unique responsibility that Quebec has.

* Address at the 34th Couchiching Conference, August 5, 1965.

French Canadians have been deprived of opportunities outside Quebec because of differences in education. Hence they have not been "free" in their fatherland because freedom implies a complete harmony between social reality and political reality. The French Canadians in federal affairs have to "hang their cultural identity in the locker room" when they enter their office. Gerin-Lajoie, insists that French-Canadian minorities be given, in practice rather than in theory, the rights which English minorities are given in Quebec.

Quebec has a right to claim special powers because it is the only province which has to play the unique role of being a "nation" to the French Canadians. Gerin-Lajoie suggests, therefore, that the constitution be changed to accept the existence of two "nations" or societies in Canada.

The events in Quebec are likely to lead to radical changes, if no constitutional changes are made. Gerin-Lajoie sees hope in recent federal-provincial arrangements whereby Quebec has established its own programs in coordination with similar programs in other provinces. He concludes by urging Canadians to reach a consensus on the debate on federalism.

E.W. Hinman, "The Role of the English Provinces in Relation to the Federal Government and to the Province of Quebec."*

The English speaking provinces must have a unity of purpose, a sense of giveand take, and a desire to use political machinery for common ends. They must accept a new role in their relationships with the Federal Government, and with Quebec because Quebec now wants to assert its national identity.

Hinman traces the development of democracy, industry, education and religion in England to show how these have been inherited by the British settlers in Canada. He also attempts to explain how English became so important with the growth of industry. As English became more important, the French Canadians realized that they had to assert their identity or they would be blended with the English Canadians in the "melting pot process". Hinman says that many English provinces have threatened political secession at one stage or another; but in Quebec's case, it was a "spiritual secession" because the people felt ignored and devaluated.

Hinman feels that the English speaking provinces should have the following roles:

1. They should understand that there are no provincial rights and Canadian rights that do not stem from individual rights. This means that there are no National or Provincial Government responsibilities that are not responsibilities to the individual citizen.

* Paper presented by E.W. Hinman, former Provincial Treasurer, the Government of Alberta, for the National Conference on the Problems of Canadian Unity at the Banff Centre for Continuing Education on June 22, 1964.

2. They must conduct their relationships with the Government of Canada and with Quebec, according to the tradition that to be in a majority does not make the majority right. Care must be taken not to ignore minority rights.

3. They should seek peaceful solutions to problems.

4. They should fight for equal opportunity for education for every child, by devising means of equalizing the opportunities and the costs of education. This means that there should be a conscious effort to share the findings of educational research and to reach agreement on core curricula.

5. They should recognize that anything the Government of Canada does to encourage industrial development in any province must benefit all provinces. The provinces should encourage international commerce, but they should not encourage an unduly favourable balance of trade with other nations.

6. They should stop the exploitation of the economically weak by the economically strong, and of the ignorant by the educated. This can be done through anti-combines legislation and the Criminal Code. Provincial controls

can be provided by the Securities Commission.

7. They should provide leadership in political integrity. The provinces should try to verify what their people want and then persuade the central government accordingly.

8. With the growth of industry, the provinces will find themselves working in the role of mediator to maintain peaceful labour relations. They should work with the Federal Government to develop new machinery for settling disputes. Economic planning will make imperative the participation of labour, along with governments, industry and educators. The Province of Quebec gives promise of leadership in this field.

9. They should follow the example of Quebec and resist all pressures to have further taxing responsibility forced on the Government of Canada.

10. They should not demand complete autonomy in many matters, because then the Federal Government will have to subsidize the poorer provinces.

11. They should ask for the repatriation of the Constitution and give to Quebec, every right which she may justly claim, whether or not in doing so, Quebec may withdraw from plans

and projects into which the other provinces have entered without constitutional necessity.

12. Finally, the English provinces should encourage French as a second language from the elementary school level, but they should not attempt to legislate bilingualism.

Daniel Johnson, "Problems of French Canadian Nationalism".*

What is needed in Canada today is a completely new constitution, based on the coexistence of two nations in the sociological sense, each having equal right to its life and to the free determination of its own destiny.

Such a constitution should include a charter of national or cultural rights with guarantees for minorities, whether they be the English in Quebec or the French in other provinces. It should also have a charter of human rights binding all the governments, both at the federal and the Quebec levels.

French Canadians do not want to impose bilingualism on all Canadian people. What they want is a "coexistence of several unilingualisms". Only at the level of the state should bilingualism become an obligation.

However, "coexistence of unilingualism" and bilingual states will not resolve all the problems arising out of the existence of two cultures in Canada. French Canadians also want the right to create their own economic and social institutions.

Historically, French Canada has always been recognized as a nation in the sociological sense. The first official recognition of Canadian duality was in the Constitutional Act of 1791 which created Upper and Lower Canada. In 1837 Lord Durham recognized the existence of two nations in Canada. And it is interesting to note that while Sir John A. Macdonald would have preferred a more centralized regime, he accepted the federal compromise because he too recognized that you cannot violate with impunity the fundamental liberties of a nation. On January 21, 1856, he wrote to his

* paper was presented at the Couchiching Conference. August 5, 1965.

friend Chamberlain concerning the French Canadians: "Treat them as a nation and they will act as a free people generally do, generously. Call them a faction and they become factious."

Moreover the five changes in constitutions in Canada culminating in the B.N.A. Act were all induced by changes in social structure. The Constitutional Act of 1791 would have lasted longer if there had been no conflict in French Canada between the Legislature dominated by the French element and an executive dominated by the English. Furthermore, the constitution of 1840 was a miserable failure; it was soon realized that, in order to better unite what should be united, it was necessary to separate what nature itself had made different. Confederation which was our fifth constitution in less than a century, was certainly a return to common sense and to a recognition of national liberties; its aim was not to unify, but rather to harmonize.

On the basis of this historical sketch, Johnson takes the view that it is the political structures that must adapt themselves to human realities and not the human realities that must adapt to political structures. He then argues that important social changes have taken place in Canada since 1867, changes which require a new constitutional arrangement in Canada.

More specifically English-speaking provinces are no longer animated by autonomist feelings. They have acquired a collective way of life which they did not have before 1867, and they are now evolving towards national unity. They believe in some decentralization, but this is for efficiency reasons rather than sociological reasons. The unity of English Canada can only be politically embodied in a strong central government, and French Canada is seeking to embody itself politically in an increasingly strong

and free Quebec. This parallel evolution makes the constitution obsolete because, within it, English Canada cannot follow its aspirations towards unity except by thwarting the desires of French Canada, and Quebec cannot extend its own powers except by forcing other provinces to take on jobs that they would rather leave to the central government.

The B.N.A. Act is thus contributing to disunity rather than harmony. The Fulton-Favreau formula for amending the constitution is ineffectual too, because it considers all provinces as similar to the others. Because Quebec needs certain guarantees to preserve her culture, it is considered necessary to give the same guarantees and the same veto powers to all the other provinces. The Fulton-Favreau formula does not satisfy the legitimate aspirations of either English or French Canada.

Johnson emphasizes that Quebec needs more powers because of the unique role it has to play as the sole guardian of French culture. Therefore, Quebec will never accept the amendment formula because it would take the veto of just one province to prevent Quebec from achieving the changes it is demanding.

Another point Johnson makes is that in order to go beyond the nation, French Canada has to first develop its potential. Only prior recognition of legitimate differences permits continued progress in the direction of harmony.

The French Canadian nation must have its own homeland, and whether this homeland will be Quebec or Canada depends upon the concern of English Canadians. When French Canadians believe that they are the masters of their own destiny, when a new constitution based on today's sociological realities allows them finally to develop themselves as a nation, then they will go beyond nationalism. However, if the dialogue between the two communities ends in failure, then Quebec will be forced to ask for complete independence.

Eric Kierans, "Repatriation of
the Canadian Constitution"*

Mr. Kierans emphasizes the need for repatriation of the Canadian Constitution for two reasons:

(1) There is a strong need for the Canadian constitution to adapt to changing conditions.

(2) At the same time there is a reluctance to endure the process of getting assent from Britain, a reluctance which kills many measures at birth.

Kierans praises the actual and potential role of the Federal-Provincial conferences as part of the machinery for adapting the political structure to changing social, political and economic needs. The conferences have contributed to Canadian unity through tne achievement of contracting out of joint programs, such as the pension fund, as well as a deeper sense of understanding of individual problems. Moreover, they have recognized the special situation of Quebec and have shown their sympathy to Quebec's desire to create her own pension fund, to opt out of joint programs and to refuse all delegation of provincial powers. Incidentally Kierans also gives credit to Premier Lesage for securing these agreements. In the future, once Canada has control over its Constitution, the Federal-Provincial Conferences can provide a link between the existing framework and the evolving constitution of the future. One might wonder whether or not future successful changes effected by the Federal-Provincial conferences will make constitutional change unnecessary.

Among the significant changing conditions which call for constitutional revision, Kierans notes the following.

* The speech was delivered to members of the Montreal Rotary early in 1965.

(1) Since the 2nd World War the provinces have gained substantial powers but they have now exhausted the possibilities for increasing their autonomy under the present static constitution. Despite this observation Kierans feels that a reduction of Federal authority is inevitable.

(2) Quebec insisted on greater autonomy and responsibility in order to (a) achieve a sufficient rate of growth and development and to (b) prevent Quebec's legitimate aspirations to becoming a "nation" from being thwarted. Quebec feels that Canada should be a binational and bicultural nation.

(3) One of the reasons for the shift of the locus of power to the provinces is the build-up of brilliant men at the provincial government levels, men who have shown a greater understanding of the problems facing Canada.

(4) There still exists a "hard core of centralist philosophy" that pays lip service to cooperative federalism. Kierans cites as an example the proposed Bank Act amendments which prohibit provincial governments or their agents from owning shares of chartered and savings banks.

David Kwavnick, "The Roots of French Canadian Discontent"*

Since 1945, the aspirations of French Canadians have changed from a desire to maintain the status quo, particularly the hierarchy of the Roman Catholic church, to a desire for full-scale economic and social emancipation. Whereas the former desire could be fulfilled by the province of Quebec, the latter is assumed to require the additional exercise of power by the federal government. Therefore it is a mistake to believe that Quebec can be the instrument of the French-Canadian nation while remaining within Confederation. In order to do justice to French Canada, it is necessary to build "an equal partnership" so that Canada becomes the state of both English and French Canadians.

Kwavnick makes a distinction between the demands of Quebec and those of French Canada. Quebec's demands are those of a unit within a federation, while French Canada's demands are cultural group demands. Intercultural problems are seen in unitary states, too, so they need not bear any special relation to federalism. Kwavnick says that before the revolution Quebec was different from other provinces in that it strove to maintain the status quo rather than seek economic and social progress. Today, Quebec is a province like any other.

The segregation of French Canadian life in Quebec and the continuation of Quebec in the Canadian federation are incompatible, he says, because the French Canadians want a whole state.

To satisfy French Canadian demands several measures should be taken. Kwavnick enumerates the usual steps; for example, publicly supported French schools wherever the French population is large enough, acceptance of French as an official working language in the federal civil service and in the armed

* From The Canadian Journal of Economics and Political Science, November 1965, pp. 509-523.

forces, and government intervention in the economy to ensure English Canadian and French Canadian control. He also suggests that the Canada Council be reformed so that it may play an effective role in the development of both Canadian cultures. The Canada Council should be divided into English and French sections along the lines of the CBC. If the basis of the new Confederation settlement is to be the equal partnership of two cultural groups, it would be wrong to assign to one province the responsibility of fostering one of those cultures.

The French-Canadian, today, demands not only the wider acceptance of his language but the acceptance of his people. English Canadians must redefine their concept of "Canadian-ness" so that it includes both English and French.

Both English and French Canada look to their states to help them fulfil their needs and each group expects that its state will have the powers necessary to provide the needs. The problem arises because each group is looking at a different state. French Canadians look to Quebec and Quebec finds that some of the powers demanded have been given to a higher level of government. Kwavnick says that the new concept of Confederation must be based on the adjustment of differences <u>at the federal level</u>. Therefore, one of the first premises to be discarded is that Quebec speaks for French Canada; and the consequent argument that the Province of Quebec ought to enjoy a special status within the Canadian Federation should be discarded along with it.

Bora Laskin, "The Provinces
and International Agreements."*

The purpose of this paper is to establish on a legal basis the answers to three important questions:

(1) Do the provincial governments have any right to make agreements, treaties and conventions with foreign powers?

(2) In what way (if any) is the federal government restricted in making agreements with foreign powers in areas of provincial legislative jurisdiction?

(3) Are provincial agents-general and provincial discussions and arrangements with foreign governments illegal?

This paper is divided into five sections. Section 1 outlines two main aspects of the exercise of authority in relation to foreign affairs in a federal state and then outlines two doctrines relevant to the settlement of where treaty making and implementing authority lie in Canadian government. Section 2 provides a very brief evolutionary legal history of the problem from British colonial days to the present time. Section 3 comprises a discussion of whether provincial executive power allows the provinces to make agreements with foreign powers. Section 4 analyzes the limitation on the Canadian federal government in (1) making agreements and (2) implementing legislation in compliance with those agreements. Section 5 analyzes the legal status of provincial relations with foreign powers - particularly the status of provincial agents-general and provincial discussions and arrangements with foreign governments.

Section 1

"Normally, the exercise of authority in relation to foreign affairs has two aspects: first, there is the executive power of direct dealing with foreign states, involving an internal determination of where that executive power resides and an external determination of international status or personality; and, second, there is the legislative power of implementing domestically, if need be, the international accord, a matter which in itself has no international significance save as it is expressly dealt with in the international contract. The legislative power of implementation raises, however, an internal domestic issue which, shortly stated, is whether a federal state must be governed in its international relationships by the distributive character of its constitutional organization."

* Paper prepared especially for the Ontario Advisory Committee on Confederation.

Either the constitution or the highest court would ordinarily be expected to settle this issue.

In considering how these matters stand in Canada two doctrines provide a relevant background:

(1) The executive powers of a government, provincial or federal, should parallel its legislative powers.

(2) According to the constitution, residual powers of legislation belong to the central government. Therefore, unless the area under consideration is "unqualifiedly found in the catalogue of provincial legislative powers, the matter is within exclusive federal competence". (Laskin p. 2)

Section 2

British colonial law showed clearly that the colonies had no international status. Later, under the now obsolete section 132, the provinces had neither executive nor legislative powers with respect to foreign affairs. In the course of political evolution, however, a problem arose whenever the international treaty involved provincial areas of jurisdiction in (a) the case where internal legislation was not required to carry out the international obligation and (b) where internal legislation was required to carry out the international obligation.

Section 3

The B.N.A. Act limits provincial legislative power territorially. Moreover, section 3 of the Statute of Westminister, 1931, expressly authorized Parliament to enact extraterritorial legislation. There is no parallel provision with respect to the provincial Legislatures. These facts do not prevent a Province from making agreements with persons or private agencies in another

Province or in another country. But can the Province make agreements with other Provincial or foreign governments?

With respect to dealings between provincial governments, nothing in the Canadian Constitution expressly permits or prohibits interprovincial agreements. Thus the Canadian Constitution is deficient in the sense that it does not provide any "judicial forum for the determination of litigable issues between Provinces" although within their areas of jurisdiction or where the property of a particular Province is concerned, provincial governments are free of the federal executive to make and implement agreements within their respective boundaries.

While the Canadian Constitution is silent on provincial government dealings with foreign governments, an obvious question arises, does the prohibition against provincial extraterritorial legislative power mean a correlative prohibition against provincial extraterritorial executive power?

Governing judicial decisions complicate the issue of provincial extraterritorial executive power. In sorting out the problem it should first be pointed out that there is no difference between a treaty, an international convention or international agreement for the purposes of international law. Neither is there any difference between these terms as far as Canadian constitutional law is concerned.

Section 4

As part of Canada's British inheritance,

(a) the conduct of foreign affairs and the acceptance of international obligations have been regarded as matters for the executive (i.e. the Cabinet although it is technically answerable to Parliament).

(b) Canadian law does <u>not</u> recognize the self-executing treaty, an international

obligation which by its own force and terms becomes operative as domestic law. Further, Canada, by international law is required to effect such legislative changes as are necessary to carry out its international obligation. Therefore internal legislation - excepting some international agreements which by their nature do not require follow-up legislation - has to be implemented before the international agreement can bind the country's citizens. These considerations lead to the following question.

Is the federal government limited in international negotiations in areas of provincial jurisdiction (a) when no follow-up legislation is required and (b) when follow-up legislation is in fact required?

Answer to (a)

Generally, in international law only one juridical personality for each country can be recognized in an international agreement. However, there have been two exceptional departures - in the cases of Byelorussia and the Ukraine (see Laskin, p. 10) - from this rule. From the description of these two examples, it appears that the necessary conditions for such an exception are an internal constitutional change and an external recognition of that change by acknowledged independent states.

The Canadian Constitution does not permit (nor does it prohibit) Provinces to make agreements with foreign states. This want of power with respect to the Provinces leads Laskin to conclude that the national executive of Canada is in law free to make any kind of international commitment. Since only one juridical personality in a country can be recognized in an international agreement, a Province cannot negotiate an agreement with a foreign state. If a Province approaches a foreign government directly, the proper response of the latter is to the Canadian government.

Answer to (b)

Under the now obsolete section 132 and when the British government was the organ for the conduct of Canadian foreign affairs, there was no limit on the federal government to make international agreements and implement the necessary internal legislation. These are however no longer applicable. The governing rule is that laid down by the Labour Conventions case in 1937. In short the Privy Council (Canada's highest court at that time) decided that the power to implement legislation arising out of an international agreement is governed by the ordinary rules of distribution of legislative power between Canada and the Provinces. Moreover, an earlier case law (Radio case) had recognized no distinction between convention and treaty for the purpose of implementing legislation in the context of international agreements.

However, in 1956, Chief Justice Kerwin, in the course of his judgement in Francis v. The Queen said that "it may be necessary .... to consider in the future the judgement of the Judicial Committee in the Labour Conventions case." No clear opportunity has since arisen for any such reconsideration.

Section 5

Just because the plenary federal executive power is not complemented by a plenary implementing power, this does not mean that the Provinces are able to implement international agreement - for the simple reason that they have no antecedent executive power to act independently in foreign affairs.

The presence abroad of provincial agents-general does not undermine this assertion because these only promote commercial interests and are not involved in any strictly diplomatic issues.

Nor do provincial discussions and arrangements (reciprocal or otherwise) with foreign governments deny this assertion because the Supreme Court

of Canada in Attorney-General for Ontario v. Scott (decided in 1955) has recognized a distinction between treaties or international agreements and arrangements which do not involve obligation to the foreign government but which envisage reciprocal or concurrent legislative action. The line between arrangement and agreement is obviously thin. Such permissible arrangements require, however, that the federal external affairs department be used as the channel of communication.

There are legal and formal differences between the arrangements sanctioned by the Scott case and the implementation of agreements made by Canada under the rule of the Labour Conventions case. If provincial implementing legislation is enacted (in order to back up an international agreement negotiated by Canada), any repeal or change of that legislation could involve Canada in a breach of international obligation. This situation could be avoided if Canada were to incorporate a "federal state" clause* when the agreement with the foreign power is made.

One can speculate as to whether the distinction between arrangement and agreement provides a rationalization of the willingness of the foreign state to forego the legal sanction that ordinarily accompanies an agreement or whether it represents an attempt to find a means of effective co-operation between Ottawa and the provinces in areas of provincial jurisdiction without disturbing the rules of international law. If so, it must be evident that not only the foreign state but Canada as well is willing to make the compromise.

* A federal state clause is defined as a clause whose purpose generally speaking is to entitle the federation to discharge its international obligation by remitting the agreement for implementation to its constituent states where it deals with matters ordinarily within state competence. (See Laskin p. 13)

W.R. Lederman "Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada"*

The purpose of this paper is "principally an attempt to explain and illustrate the total process of interpretation of the B.N.A. Act on the basis of the aspect theory" with a view to answering four general questions:

(1) What are the essential elements of the system of interpretation of the distribution of powers?

(2) Where is it flexible and where rigid?

(3) What is the nature of its appeal to both reason and authority?

(4) Is the traditional superior court essential to the process?

The paper comprises four sections. The introduction outlines briefly the problems involved in the interpretative process and reveals the purpose of the remainder of the paper (see above). Section II discusses the problems of classifying laws which have aspects or features falling under both federal and provincial lists of powers of jurisdiction. From these problems, two dilemmas arise. Section III provides some solutions to these two dilemmas. Finally section IV examines briefly the necessity for independent judicial review of the federal distribution of powers.

II. Classification of Laws and the Aspect Theory

The B.N.A. Act speaks of power to make laws in relation to matters coming within the classes of subjects thereafter enumerated. But 'subjects' and 'matters' simply refer to different aspects or features of the laws to be classified. Put the other way around, any law has possibly a number of aspects or

*Presented at the Conference of the Learned Societies, Charlottetown, June 1964.

features. And if some features of this law fall under the provincial list and other features fall under the federal list, classification of laws for the purpose of determining legislative jurisdiction becomes complicated.

It becomes complicated because not only facts but rules of law have to be considered as aspects in the classification. What one proposes to do by a law about a certain type of fact situation may well have as much bearing on classification of that law as does the nature of the facts alone. Law is normative, not merely descriptive.

Some failure to settle questions about legislative jurisdiction arises from a lack of specificity about the terms of law. To illustrate this point, Lederman cites several reference cases, and cases which have been decided as the result of actual litigation. From the description of these cases, he concludes that "The most fruitful constitutional discussions are likely to be those that start with specific legal remedies and measures conceived to be useful as necessary to meet our various national and regional problems."

Nevertheless, much of the difficulty in deciding questions about legislative jurisdiction reflects solely the different aspects of a given law falling under both the federal and provincial subject lists.

Now categories of federal power and some of those of provincial power are capable of very broadly extended ranges of meaning. And if one of these concepts of federal power should be given such a broadly extended meaning, and also priority over any competing provincial concept, then federal power would eliminate provincial power. So could the extended meaning be applied to a concept of provincial power. Thus there exists a possibility that supreme court interpretation could eclipse either federal or provincial power. This possibility is the first dilemma of the distribution of powers.

The second dilemma is stated as follows. The citizens of the country should not be exposed to conflicting laws. Therefore, where no extreme interpretation is made - that is when both federal and provincial aspects are taken into account by the supreme court - there must be some further step in the classification process whereby the federal aspect is made to prevail over the provincial one or vice versa, for purposes of decisive classification. Section three provides some solutions to these two dilemmas.

III. Solutions of the Dilemmas of the Distribution of Legislative Powers

With respect to the first dilemma Lederman opines that the courts have indeed tended to avoid extremely extended meanings for categories of federal power at the expense of those of provincial power, and vice versa. He cites several cases as evidence of this.

With respect to the second dilemma, two main steps should be taken. First, the full meaning of the statute - that is the effects of the challenged statute on those observing it and those enforcing it - must be understood. Secondly, having determined the full meaning, federal aspects and provincial aspects will no doubt still be present. However, in some instances the greater relative importance of federal (or provincial) features will enable the judges to rule the power to be exclusively federal (or provincial). In other instances where the contrast between the federal and provincial features respectively of the challenged law is not so sharp, then the area of law should come under concurrent legislation - provided there is no conflict in what the legislation of the two governments prescribes for the persons subject to it. If there is conflict, then the Dominion legislation must prevail.

It is interesting to note that in recent years, there seems to be a liberal trend respecting concurrency developing in the Supreme Court of Canada. Moreover, given that a concurrent field has been found, the court is becoming quite liberal about permitting federal and provincial statutes to live together in that field. Nevertheless, the doctrine of dominion paramountcy implies that federal power is over-riding in a concurrent field and therefore the trend to increased concurrency may be dangerous to provincial autonomy. However, so far, the main effect of this trend has been to uphold provincial statutes. Furthermore, political agreements about what each legislative body will or will not do in the concurrent area (e.g., federal-provincial taxation agreements and Sunday observance legislation) have precluded to some extent Supreme Court interpretation.

The upshot of this is that federal constitutional interpretation in Canada might be said to call for mutual exclusion of powers if practical but concurrency if necessary. In either case the process of interpretation requires decisions about the relative values represented by the competing federal and provincial aspects of the challenged statute. Since logic merely displays the many possible classifications of law the Judges in addition to logic need to make value criteria in order to make their decisions. Lederman states that, "If we promote the well-being of the people then some of the necessary criteria will emerge".

The need for <u>both</u> logic and value judgements in the interpretive process should be underlined. Logic prepares the way for and reveals the need of the value judgements that <u>are</u> in the end decisive.

Nevertheless, authoritative precedent does enter the interpretative process in a very important way. It is not clear yet whether the Supreme Court will assert a right to depart in exceptional circumstances from particular decisions in the accumulation of Privy Council precedents.

In summary the classification process joins logic with social fact, value decisions and the authority of precedent to define the distribution of law-making powers.

IV. The Necessity for Independent Judicial Review of the Federal Distribution of Powers

The necessity for an independent judicial review of the federal distribution of powers is clear. If either the federal parliament or the provincial legislatures could be permitted to act as judges of the extent of their own respective grants of power under the B.N.A. Act we would soon have either a unitary state or ten separate countries.

Of course, certain principles are necessary to ensure the integrity of the interpretive process in the hands of our superior courts, particularly the Supreme Court of Canada, since the selection of the aspect that matters (whether provincial or federal) is the exclusive prerogative of the court.

Despite the fact that great numbers of working decisions are made at every important level of government by a great variety of officials and their legal adivsers, the relatively few issues taken to the Supreme Court of Canada are critical because it is the final resort in a showdown and its interpretation is a guide line to be respected at other levels of government.

Discretion, inevitably inherent in the process of interpretation requires more wisdom and realism and this requirement provides strong argument for having an internal tribunal rather than the Judicial Committee of the Privy Council in London.

Lederman opines that misgivings about the Supreme Court's independence from the influence of Parliament are unfounded. For one thing constitutional tradition implies that Parliament would never change the Supreme Court Act in any way prejudicial to the true independence of the Court or its judges. Nevertheless, the statute of the Court could be specially and formally entrenched in appropriate clauses of the Canadian constitution.

Appointment of Supreme Court judges should remain with the Prime Minister of Canada and his Cabinet. Once a highly qualified person has been appointed to the security and independence of the Supreme Court Bench, he must simply be trusted to rise to the challenge of the office with integrity and intelligence. His position is then that the Supreme Court of Canada should be continued in its present function and power of final interpretation of the distribution of legislative powers.

J.R. Mallory, "The Five Faces of Federalism."*

The five faces of Canadian federalism which are traced from confederation up to the present are: (1) quasi-federalism; (2) classical federalism; (3) emergency federalism; (4) cooperative federalism; and (5) "double-image" federalism.

Mallory concentrates on the "double-image" federalism which evolved partly as a result of French-Canadian nationalism and partly as a reaction against the trend to centralize all economic and social policy by the federal government. Mallory feels that the trend towards centralization would have continued in Canada, as in the United States, had it not been for the "French-Canadian fact". His definitions of the first four faces of federalism are quite standard.

(1) Quasi-federalism existed in the Macdonald era when the federal government resorted to disallowance and reservation to curb the growth of provincial powers. There were three main reasons for this. First, the example of disarray in the U.S. federal government encouraged strong central government in Canada. Secondly, the weakness of political parties and the lack of administrative experience in the provinces put them in a state of dependence on the federal government. Thirdly, the tradition of regarding the provinces as 'colonies' was still very strong.

(ii) Federalism of the classic type was brought about by court decisions. Since federal constitutions are hard to amend, courts have to adjust the meaning of the constitution to face social change. By the 1930's court decisions had given considerable power to the provinces.

(iii) Emergency federalism existed in wartime when the executive took over vast power for the defence of the country. This period was also characterized

* Presented at the Annual Meeting of the Canadian Political Science Association at Charlottetown on June 11, 1964.

by the decline in the role of courts as arbiters in the balance of jurisdiction in the federal constitution and the change in the attitude of business elites. Whereas big business had formerly defended provincial powers, it now transferred its loyalty to the federal government because business interests spread beyond provinces.

(iv) Cooperative federalism emerged in the postwar period and led to many joint decisions by the federal and provincial governments. The three main areas of coordination include (1) consultation of officials on joint programs; (2) delegation by Parliament of regulatory functions to provincial agencies; and (3) federal expenditure on provincial and municipal projects. These joint schemes have involved the federal government in heavy expenditures and they have limited provincial autonomy. A reaction against these is now taking place.

(v) The latest crisis in Canadian federalism has been labelled by Mallory, "Double-Image Federalism". The crisis is the product of two forces — the desire of the French speaking people to assert their identity and the reluctance of English-speaking Canadians to accept the "French fact". French Canada now looks to the power of the state to satisfy its wants and to bring economic development. This must be done by Quebec and not by Ottawa, for the new elites wish to share in the management of the new society. Mallory suggests that a readjustment be made in the constitution to include certain individual rights so that the French Canadians feel more secure. The federal government must not weaken its fiscal and monetary powers but is should be sympathetic to difficulties encountered by individual provinces. If federalism in Canada is to succeed, substantial readjustments will have to be made to meet the nationalistic demands of Quebec.

Kenneth D. McRae, Switzerland: Example of Cultural Coexistence*

Introduction:

Switzerland is a federation of 19 cantons and 6 half cantons which are autonomous in all matters except those delegated to the federal government. Most cantons are officially unilingual; three are bilingual in French and German, and one is trilingual in German, Italian and Romansch. Three cantons are officially French speaking and one Italian. The remaining cantons are German speaking.

The interesting fact about Switzerland's linguistic groups is that despite the great differences in their sizes, no attempt is made to absorb any language group. On the contrary, the majority of the German speaking group has fought for the rights of minority groups. There are four national languages in Switzerland. The 1960 census revealed that 74 per cent of the population was German speaking, 20 per cent French speaking, 4 per cent Italian and 1 per cent Romansch. (Romansch is a minor language descended from Latin and spoken in a few Alpine valleys in Eastern Switzerland)

Most cantons are divided on religious lines. There are 10 strongly Catholic cantons, and 7 strongly Protestant ones. It is fortunate that the religious and linguistic boundaries do not coincide, but offset one another. Linguistic and religious minorities can combine to form a majority, thus constituting a check on excessive use of majority rule.

Historical Background

Switzerland has a strong heritage of communal independence. Under the impact of French revolutionary ideas, the Helvetic Republic was formed in 1798, which gave German, French and Italian citizens complete equality

*Published in Toronto, 1964, by the Canadian Institute of International Affairs.

before the law. This regime was replaced by centralist regimes, but by 1847 the struggle between modernism and conservatism was won by the liberals. The 1848 constitution remains the constitution of Switzerland today. In Switzerland linguistic problems have always been subordinate to religious ones; rights were given to the smaller language groups quite voluntarily.

Constitutional Provisions for Languages

Article 116 maintains German, French and Italian as official languages; these three languages have equal standing in the parliamentary, administrative and judicial spheres of the federal government. Romansch is the fourth national language although it is not an official one. Any canton or linguistic area has the right to preserve and defend its own linguistic character against all outside forces. The linguistic frontiers are sharply defined and have changed very little in the past century. Federal authorities are obliged to deal with cantonal authorities in the language of the canton, and all cantontal laws and regulations are issued only in the official language or languages of the canton. In the case of bilingual cantons there is an attempt towards equality between the cantonal languages. Disputes are settled at the local level without federal intervention.

Conventional Provisions for Languages

German-Switzerland has 26 dialects and these regional dialects are spoken universally with no social stigma or inferiority implied in the use of dialect. This makes German less of a threat to other language groups. The French in French-Switzerland, however, is very close to standard French. Also, French has a prestige in Switzerland that serves as an effective counterbalance to its numerical weakness. Many German-Swiss go to French-Switzerland specifically to learn the language. A conversation between a French-Swiss and German-Swiss invariably takes place in French.

When German-Swiss address gatherings outside their canton, they abandon dialect and speak in high German as a convenience to their audience.

The Italian-Swiss and the Romanschs have to learn another language for any career. When the German-Swiss move to French cantons, they easily assimilate with the French, but when they move to the Italian canton, Ticino, they tend to cling to their own language. By contrast, the Italian and Romansch-speaking Swiss assimilates rapidly into the German milieu.

The French and German-Swiss enjoy the same economic standard of living. Disparities are greater within than between these two linguistic groups. Italian-Switzerland, however, is poor by contrast, and this situation aggravates its already weak position in the confederation.

Use of Language in Swiss Institutions

(a) Parliament

The National Council reflects the linguistic composition of cantons. The Upper House is composed of two members from each canton, but cantons are free to provide special representation for their linguistic minorities. Members of both houses are free to speak in the language of their choice and the texts of federal laws are published in all three languages. In practice, however, Italian is rarely spoken. The Federal Assembly is a thoroughly bilingual parliament but only on rare occasions is Italian given equal status.

(b) The Executive

The seven-man Federal Council tries to express the linguistic, regional and religious differences of Swiss society. There are generally two French-Swiss in the Council, and sometimes one from Ticino.

The Public Service

Until recently the French-Swiss were underrepresented in the highest offices of the public service. For personnel working in the central administration two official languages are required. Senior officials are generally required to be able to write and speak in both French and German. The language qualifications are less rigorous for decentralized services. Internal language usage in the federal public service follows an interesting pattern. In Bern the administration is bilingual in German and French. Italian is ignored. Divisional heads and their deputies are chosen to develop accurate texts of departmental documents in their own mother tongues. Since relatively few civil servants understand Italian, it tends to be a language of translation only.

The Judiciary

The Federal Tribunal must have representatives from all three languages. The Italian and French-Swiss have been represented more than proportionately. All judges are required to have a working knowledge of the three official languages. In civil litigation, appeal decisions are given in the language of the canton from which the cases arise. In criminal cases the proceedings are in the language of the accused, provided it is an official language. Cases involving Romansch-speaking parties are decided in German, but where necessary documents are translated into Romansch at public cost. In plurilingual cantons the principle of territoriality is applied to local

and district courts, and at the cantonal level the courts are free to follow any language. (Bern and Valais deliver judgements in French or German on an equal basis. Fribourg recognizes only French, while the trilingual canton Grisons conducts proceedings in German, accompanied by a translation into Italian or Romansch if necessary).

Political Parties

Linguistic differences do not play a major role in political parties because questions of religion, economic interest and social class are strong enough to obliterate linguistic considerations.

The Army

Army units are formed from men of the same canton to facilitate communication. The soldier should be addressed and instructed in his own language. All important army manuals are published in three official languages. Problems are faced today because of the technical nature of many courses. Romansch-speaking soldiers are trained in German or Italian. All officers, like civil servants, are expected to have an adequate knowledge of two or three national languages. All army personnel are encouraged to learn different languages through the practice of schools and specialized courses in different linguistic areas.

Education

This is a cantonal matter and the assimilation of immigrants from other linguistic areas is accomplished primarily through the schools. In bilingual cantons, two state school systems exist side by side to accommodate different language groups. Swiss consideration for minority groups is especially seen in the federal subsidies given to cantons in mountainous

areas and to the Italian and Romansch cantons. Ticino and Grisons receive a special "linguistic supplement" because of their heavy burdens for special text books and teacher training. In secondary schools a second national language is compulsory. French is generally studied in German and Italian Switzerland, and German in French Switzerland.

Broadcasting and Publishing

In radio broadcasting, the principle is that three complete and equal program services should be offered, and this principle is almost followed in practice. Very few programs are in common. The financial arrangements in broadcasting heavily favour the minority groups, but this disproportion is defended on the grounds that it is necessary to provide adequate services. Not only are there differences in language, but there are also different conceptions of the role of broadcasting. The German view is that broadcasting should be educative, while the French view is that it should entertain. The radio stations also broadcast special programs for minorities working in Switzerland.

The newspapers follow the principle of territoriality and this preserves their linguistic balance. French and German periodicals are well balanced in terms of numbers, but the Italian and Romansch groups face difficulties.

Since 1931, the federal government has further helped minority groups by giving them grants in support of literature, theatre, music, libraries and other cultural activities. In 1939, the Pro Helvetia Foundation was formed to interpret Swiss culture abroad. This foundation strongly upholds the plurilingual state.

Current Linguistic Problems

Difficulties exist mainly at the cantonal level or below, but very seldom at the national level. The main problems have been with the French minority in Bern and with the Italians and Romansch.

The Jura territory in Bern is French speaking and mainly Roman Catholic. In 1947 the Jurassien organizations asked for separate schools, equalization of French and German in the cantonal constitution, and a recognition of two distinct peoples in Bern. These claims were partially met by constitutional changes, but certain militant groups asked for a separate canton. In 1959, the question was put to a referendum, and even in Jura itself it was defeated by a slight majority. However, the defeat intensified separatist feeling. The Jurassiens have developed a conception of intense nationalism that is most untypical of Switzerland.

The Italian canton, Ticino, has had many German immigrants who refused to assimilate with the idigenous population and set up their own institutions. The economic and educational superiority of the immigrant Germans put the Italians at a disadvantage. However, conditions are changing now and the younger generation is learing Italian. The Romansch-speaking people have an even greater problem in preserving their language in the age of mass communication.

Another major problem arises in Bern which is a German-speaking city situated in a German-speaking region of a bilingual canton, and which is also the capital of plurilingual Switzerland. French-speaking civil servants have complained about the lack of educational facilities in French for their children. On the other hand, local officials stuck to the principle of territoriality and refused to recognize French. In 1944 a French school was established as a private foundation and was given a grant by the federal government. No such school exists for the Italian community.

In Switzerland, today, there is active intervention on behalf of the smaller cultural groups. There is a general agreement that a threatened minority group will find the support of the Confederation at large to preserve its cultural heritage. Minority groups seem to get more than their share in the Upper House, the Federal Tribunal, the educational system, the broadcasting system and in the form of federal grants and aids.

E. McWhinney, "A Supreme Court in a Bicultural Society: the Future Role of the Canadian Supreme Court."*

The purpose of this paper is to suggest an outline for restructuring the Supreme Court of Canada. The suggestion is based partly on an analysis of the functioning of Continental European final appellate tribunals and mainly on the experience of the Supreme Court of Canada in the 1950's and early 1960's.

The paper comprises five sections. Section 1 argues that a Supreme Court in a federal state is desirable, necessary and inevitable. Section 2 describes three distinguishing characteristics (collegiality, anonymity and specialization) of European Continental supreme courts and singles out specialization as the best characteristic from the point of view of technical efficiency. Section 3 demonstrates how special chambers can solve the problem of lack of specialization and specialist expertise in the Supreme Court of Canada. Section 4 describes the Common Law-Civil Law split and the closely parallel split between the French-speaking and the English-speaking in the Supreme Court of Canada in the 1950's and points out the opposed value systems of the two groups. Section 5 concludes the paper by noting that the real underlying conflict is political but that events both outside and inside Quebec in the early 1960's provide more hope for an eventual solution - that is, a Supreme Court of Canada with special chambers.

Section 1

Theoretically it is possible to have a federal constitutional system without a federal supreme court that serves in effect (in the American Constitutional phrase), as "umpire of the federal system". Imperial Germany,

*Paper prepared especially for the Ontario Advisory Committee on Confederation. Source: See generally, Judicial Review in the English-Speaking World, University of Toronto Press, 3rd Edition, 1965.

perhaps, provides a practical example of this theoretical possibility but those federal systems which have flourished for any period of time have all been "characterized by strong final appellate tribunals, staffed, from time to time, by dominant judical personalities, who have managed successfully to assert the power to review, and ultimately, if need be, to control, the decisions and determinations of the co-ordinate, executive and legislative arms of government."

The power of final appellate tribunals, while stemming from different historical origins has in practice amounted to the same thing in all classical federal societies. Two federal legal systems, the Swiss and the West German (Bonn) Constitution of 1949 are used as illustrative examples of this point.

In view of the successful practical experience with judicial review under a wide variety of conditions in widely differing societies, contemporary legal scientists might well conclude that judicial review of the constitution, as exercised through a federal supreme court is a desirable, necessary and inevitable feature of any classical federal constitutional system such as we have in Canada.

Section 2

There are three features which distinguish Continental European from Anglo-Saxon (i.e., U.S. and the Commonwealth Countries) final appellate tribunals - collegiality, anonymity and specialization. First the Continental European court is collegial in the sense that its special chambers or banes which sit as a whole make their final decision in terms

of a single opinion. The only remotely proximate Anglo-Saxon analogue to this is of course the Privy Council. Secondly the Continental European court is anonymous in three senses: (1) the single collective opinion of the court remains unsigned by its main judicial author or authors, (2) there is no public record of dissents, disagreement or even qualification to the seeming unanimity, and (3) the judges are in general strangers to the public being disassociated with political debate. McWhinney notes, however, the practical inevitability that the Continental judges will increasingly be drawn into the public spotlight as their roster of cases expands; this may also lead to the breakdown of both anonymity and collegiality. Thirdly, the Continental European court is a specialized tribunal both in terms of its jurisdiction and of its judiciary. France and Germany are illustrative examples.

Wiser judicial policy-making in great political causes célèbres requires wide canvassing of the various policy alternatives in any given problem-situation. This requirement points inevitably to the merits of a breakdown of anonymity in European courts (i.e., the permission to announce the courts' vote and to publish grounds for minority decisions within the court).

Further, specialization in Continental European courts - as manifested in the proliferations of Supreme Courts that are specialized in terms of subject matter - has not produced any especial confusion or overlapping of jurisdiction as between the different courts or any inconvenience to the general public. In short, the disadvantages of

specialization may be largely imaginary. It is also noted that the U.S. Supreme Court, since 1925, has been converted as a matter of law-in-action into a specialists' public law, indeed constitutional law, tribunal - a fact reflected in recent presidential nominations of "men of affairs" rather than narrowly technical lawyers.

Section 3

Turning to the Supreme Court of Canada, McWhinney notes two deficiencies. The court lacks specialization and specialist expertise, especially since the losses of Mr. Justice Kellock and Mr. Justice Rand (specialists in Constitutional Law) and of Chief Justice Duff (specialist in Conflicts of Laws). In part, lack of harmony between the Common Law and Quebec Civil Law can be traced to the lack of specialist expertise.

Emphasis on numerical composition of voting majorities on the court and the concretization in statutory form of the principle of regional representation on the court, is, of course a recognition of the "cultural" aspect of laws and legal codes in general. Some past political gaucheries, whereby the Common Law judges have in fact imposed their final judgement by sheer weight of numbers upon their Civil Law brethren, can not be excused. Nevertheless, in private law cases, such occasions have been few and in general they have not worked substantive injustice in their end result - especially since the Supreme Court of Canada became a final appellate tribunal in its own right in 1949. Moreover the responsibility for some of the judgements lies partly with the lack of progressiveness of the Quebec Civil Law judges themselves as evidenced in their decisions on the Quebec Civil Code.

In view of these deficiencies, McWhinney thinks that the Supreme Court should be reorganized into specialist chambers including a Civil Law chamber. Specialization of chambers is a better alternative to copying the American pattern of jurisdiction of leaving all private law matters to the various State Supreme Courts as final appellate tribunal. Also specialization could be extended to Common Law and Constitutional Law.

Section 4

The main burden of current Quebec complaints concerning the Supreme Court of Canada, as presently constituted seems to be directed at its record of constitutional law decisions in cases originally arising from Quebec in the 1950's. In these decisions, the court has split along ethnic - cultural lines. Nor has this split been healed with changes in judicial personnel since 1959 - as evidenced in the voting split in the "Lady Chatterly's Lover" case in 1962.

"If the Common Law judges and the Civil Law judges represented in these cases are to be considered as in any sense 'representative' of their different ethnic-cultural traditions with their distinctive value systems and value preferences, it is evident that we have two quite separate, and in many important respects conflicting, Weltanschauungen, operating in Canada at the present day." The former have a strong "sense of liberty" and "sense of progress" with an associated distaste for unwarranted and intolerable infringements on fundamental liberties of the citizen. The latter have a strong "sense of order" which requires more restrictions on fundamental liberties of citizens.

Section 5

If these proposals for changing the Supreme Court mean a change in effective political power in the determination of basic constitutional values as well as an improvement in its technical efficiency, such re-organization may prove unacceptable to a majority of the country.

Should the jurisdiction of any specialist Civil Law-composed chamber necessarily include also public law cases arising interstitially to the Quebec Civil Code, as the Roncarelli case in 1959 in fact did? In answering this question, one should not condemn the proposed special chamber on the basis of the composition of the personnel (e.g., equal numbers of voting rights of both French-speaking and English-speaking Canada) within that chamber.

The real problem may be summed up in the question, "Can one have two radically different conceptions of constitutionalism and constitutional liberties operating within a single country and still have viable federal system?" Recently one has more reason to be optimistic about a "yes" answer to this question. Mr. McWhinney notes the Soviet-Western detente of the last several years and its corollary that co-existence may be politically practicable and reciprocally beneficial and useful, granted a sufficiency of good-will and common sense on both sides.

But more important, McWhinney hints that if the best ideals of the Lesage Revolution are really to be achieved and realized, Quebec jurists may take it upon themselves to jettison the old conservative "sense of order" ideal.

Alex Mesbur, "The Making of Federal Constitutions."*

This paper is a study of six aspects of the constitution-making process in the United States, Australia, India, Pakistan, Malaysia and the West Indies:

(a) The political and constitutional background to federal constitution making.

(b) Constitution-making as an amendment process.

(c) The use of committees of inquiry, commissions and conferences in the period before final constitution-making.

(d) Creation of constitutions by legislation and order-in-council.

(e) The constituent assembly as a constitution-making device.

(f) The use of referenda and the ratification of constitutions.

Since these states are - or were in the case of the West Indies - federations, and since all were faced with problems of regionalism, and cultural, religious or language differences, they are particularly interesting from the point of view of Canadian experience. However, no implications for Canada, in fact, are drawn.

The paper concludes that: (1) the process of constitution-making can follow many paths, and no solutions are easy (2) In each nation it is clear that, in some way, the public must become involved in the constitutional process - although the involvement may range from a small number of local leaders and politicians on the one hand (in the least developed colonies) to participation in referenda on the other (in the U.S. and Australian cases).

* A study of Constitution-making Processes in the United States, Australia, India, Pakistan, Malaysia, and the West Indies. (August 1965).
The research for this study was done at Queen's University, Kingston, Ontario.

A. THE POLITICAL AND CONSTITUTIONAL BACKGROUND TO FEDERAL CONSTITUTION-MAKING

In describing the six states, several political and constitutional background characteristics are noted such as: (1) the independence of the state at the time of the drafting of the constitution, (2) the need for a more organized economy and administrative system and better military defence as inducements to federate, (3) religious conflict, and (4) political maturity of the country's populace at the time of the drafting of the constitution.

B. CONSTITUTION-MAKING AS AN AMENDMENT PROCESS

Apart from the unique experience in the United States, constitutional amendments arose from the fact that states (e.g., Malaysia and the West Indies) were partially dependent at the time of proposed federation; for this reason amendments were clearly contemplated when the constitutions were promulgated.

In the United States, amendment played a large role in the creation of an entirely new constitution. Initially the purpose of the convention was solely to revise the Articles of Confederation. However, "Professor E.W. Burges ... has forcefully pointed out that what the convention 'actually did, stripped of all fiction and verbiage, was to assume constituent powers, ordain a constitution of government and liberty and demand a plebiscite thereon over the heads of all existing legally organized powers'".

C. THE USE OF COMMITTEES OF INQUIRY, COMMISSIONS AND CONFERENCES IN THE PERIOD BEFORE FINAL CONSTITUTION-MAKING

Notwithstanding the experience in the U.S., it is argued that this device is primarily a pre-constitution method by which a colonial master can examine the desires of the colony and in that way reach conclusions upon which to build a constitution. Investigatory commissions were prominent in Malaysia and even more so in the West Indies.

In general, the pattern in colonial nations has been for the Secretary of State for the colonies to send out a commission or committee to inquire and to prepare a report, as was done by the Reid and Cobbald commissions in Malaya, and the Cabinet Mission in India. If the changes proposed are basic, they have been settled in conferences in London, the results being discussed by local committees and legislatures before a finished set of constitutional proposals becomes the basis for legislation. The commission method can of course be used internally by a federal state, with each local unit appointing members to a general conference which can reach broad agreement and then have the details completed by committees, all subject to the final approval of the unit governments.

D. CREATION OF CONSTITUTIONS BY LEGISLATION AND ORDER IN COUNCIL

In Australia, Malaya and the West Indies, British legislation was necessary to implement the constitutions decided on at the conference. Constitutions had to be implemented by either an Act (as in Australia and Malaya) or an Order in Council under an Act (as in the West Indies and part of Malaya).

The Order in Council method suggested in the West Indies reintroduces the Canadian problem whereby amendment power lies in hands outside the federation. There is no machinery to amend the constitution and amendment is certainly needed. Thus Canadian experience argues strongly for establishing at the outset specific machinery for amendment located in the federal nation.

E. THE CONSTITUENT ASSEMBLY AS A CONSTITUTION-MAKING DEVICE

In the case of the U.S., the convention in 1787, called by Congress ostensibly to amend the Articles of Confederation became a full constituent assembly at a very early stage.

An important characteristic of the American Constituent Assembly was that it was kept secret so that the public was not made aware of conflicts and compromises within it. In the American system the Constituent Assembly stands at the apex, for it was this body which created the instrument which became the supreme law of the land.

Australia in many ways followed the American model both in the type of constitution produced and in the procedure used to create it. The elements of secrecy, the work of details being done in committee, and the use of recess, seem to closely imitate America - a clear indication of the advanced technique the United States had created as early as 1787.

In India's case the split between Hindu and Muslim of course resulted in two constituent assemblies, each acting as an interim legislature, one for India and one for Pakistan. The Indian assembly which had already been composed before the split, quickly produced a new constitution. Most of the work was done by committees and by the leaders of the Congress party, their proposals being modified slightly by the assembly.

Pakistan was given the same basic constitutional machinery as was India.

"In general, certain procedures seem to mark the rise of Constituent Assemblies. The pattern seems to be to create a general set of resolutions, refer them to committees for detail work, and then have a drafting committee draw up a constitution. This is often submitted to the country as a whole, or to legislatures, for discussion, and then the assembly makes its final changes and adopts the document, usually leaving only ratification to bring the constitution into effect."

F. THE USE OF REFERENDA AND THE RATIFICATION OF CONSTITUTIONS

"The use of a referendum or plebiscite has been one of the devices common in constitution-making, either in ratification of a constitution, or to get popular approval before a constitution is framed, or even, as in the West Indies, to spur dissolution of a federation." As a pre-constitutional device, the referendum was used in India, Pakistan and Malaysia. In Australia, a referendum was used to indicate acceptance of the constitution by the Australian people - although it was the subsequent British legislation which brought the constitution legally into effect. In India and Pakistan, under the Constituent Assemblies, there was no element of public approval necessary to bring constitutions into being since the Assemblies were sovereign bodies empowered to create constitutions by a British Act. Neither was the present Pakistani Constitution (1960) ratified by means of a referendum; approval by the President and his executive were sufficient to ratify it. The West Indies also had no official ratification procedure as Britain passed the necessary legislation after local agreement was reached.

In the U.S. each state elected conventions to consider ratification. It is interesting to note that ratification by state legislators was avoided to prevent later legislations with drawing consent. The framers felt that a resort to the people was a resort to the ultimate source of authority in a nation. After considerable debate - which led to the addition of the Bill of Rights as the original amendments - the state conventions did ratify it and a new nation was brought into being by summer of 1788.

W.L. Morton, "Needed Changes in the Canadian Constitution"*

The present unrest in Quebec is the result of a failure of human comprehension of one another by the French and the English rather than a failure of the constitution. Morton says there is no present purpose of any provincial government in Canada, even that of the Province of Quebec, that might not be realized under the existing constitution, if the necessary money could be found.

He, therefore, proposes no major changes in the constitution but he would like to see a few amendments made to guarantee language, legal and educational rights for French Canadians outside Quebec.

The revolution in Quebec was not a revolution against English Canada but against a Quebec that was. Before any changes can be made in the constitution, English Canada must have its revolution. The English revolution will be to accept the concept of two complete nationalities in one federal union. Morton strongly advocates the concept of a bi-national federal union.

What is the Canadian constitution? Morton describes this as the sum total of the BNA Act of 1867, the traditions and principles of the Government of the United Kingdom, the other BNA Acts down to 1949 and the federal-provincial conferences. The French were given the right to use their language, law and religion but they were definitely not given cultural equality. They were a subordinate but recognized nationality.

The two problems to be faced wnen advocating any changes are: (1) How should the constitution be amended where matters of both federal and provincial jurisdiction are concerned; and (2) To what purposes ought the constitution be amended?

* Presented at the 1965 Couchiching Conference.

Morton would like to see the constitution amended in Canada by using a simplified version of the Fulton-Favreau formula. He suggests that Parliament issue a Declaratory Act saying that the amendment of the federal-provincial parts of the constitution shall be amended by a majority of the provinces and population of Canada, except in matters declared to require unanimity.

(The Fulton-Favreau formula elaborates on this by saying that if the federal government does not wish to use a certain power and if at least four provinces want a power, the federal government may delegate such power to the provinces. Morton is sceptical about this part of the formula because he feels that all the provinces will seek greater sources of revenue.)

Morton strongly feels that no constitutional amendment, in terms of constitutional powers and responsibilities, is necessary. He feels that any desire of French Canadians, short of independence, can be achieved under the present constitution. This is what the French Canadians have failed to realize. The English Canadians, on the other hand, have failed to comprehend the bi-national character of Canada and have destroyed the guarantees of educational minorities and the legal rights of the French language outside Quebec.

The changes urgently needed are: (1) establishing a practical working equality of French and English; (2) ensuring that the Civil Law exists without distortion by English language or procedure; (3) giving French Canadians the right to use their language and to educate their

children in French anywhere in Canada; (4) making the federal government and civil service bilingual in law and in practice; (5) referring French language and educational rights to a federal-provincial conference as soon as the Laurendeau-Dunton Commission has reported; and finally if all these fail (6) forming a government of national concentration with the task of summoning a constitutional conference of governments and legislatures to rewrite the constitution as a whole.

Peter J.T. O Hearn, Peace, Order and Good Government*

The new constitution proposed is based mainly on the British North America Act and its amendments, but it does suggest some controversial changes. In the first place it would like to abandon the principle of exclusive powers and replace it with a system of dominant powers so that the federal and provincial governments are not forced into artificial and arbitrary watertight compartments. This means that all powers are in effect concurrent powers. Secondly, it suggests the establishment of a federal-provincial council that would solve the fiscal problems which exist between the two levels of governments. Both the Government of Canada and the provinces are given the right to impose taxes by any method they choose. Finally, the new constitution purports to be more democratic in that it suggests that the governor general and senators be appointed or elected and it lists a series of individual rights under the heading "Limits of Government."

The Constitution begins with the standard preamble and then Article I proclaims English and French as the two national languages. Any person may use French in the legislature or courts of any province. Article 2 defines citizenship and the rights and privileges of citizens. Citizens shall have the right to vote, run for public office, and publish "peaceable Comment on public affairs." Peace officers and troops shall be composed of citizens only and citizens shall have the "Right to keep Arms for lawful Defence". This section is not found in the BNA Act but O Hearn feels that it is essential and desirable to incorporate it.

*Mr. O Hearn is lecturer in criminal procedure at Dalhousie Law School, Halifax, Nova Scotia.

Parliament

The senate shall represent provincial viewpoints because an equal number of senators will represent each province. O Hearn would like to see 90 senators, nine from each province. The system of senatorial appointments should be changed so that 2/3 of the senators are elected or appointed by each province and the rest appointed by the federal government. The provincial senators might be elected by dividing each province into senatorial districts, each of which would elect a senator at every national election. This system seems valuable because it would be (1) more democratic; (2) it would represent provincial interests; and (3) it would curb the preponderance of the executive over the legislature. No measure can become law without concurrence of both Houses of Parliament with the exception of a Bill passed by the Commons that survives a national election. (The latter is a convention which O Hearn puts into law)

The BNA Act gives the Governor General the power to disallow or reserve a bill. O Hearn does not think this power is necessary today, but rather than leave it out, he modifies it so that the executive veto can be overruled if at the same Session or the next ensuing Session, each House approves the Bill by a vote of two thirds of the members present. (This provision is made for any future problems that might arise in the functioning of cabinet government)

The Executive

Executive power is vested in the Sovereign but there is to be a Governor General who shall exercise it in the name of the Sovereign. The Governor General shall have the power to commission investigations in addi - :on to the powers he already has. O Hearn sees the possibility of an elected Governor General who is the actual head of administration. There is to be a

Censor General who shall conduct the Census and all elections to the Parliament. His office will be a combination of the present positions of the chief electoral officer and the auditor-general. Although he does not state this in the Constitution, O Hearn would like to combine the Speaker's office with the Censor General's and make it a statutory office of long duration. He suggests that a Deputy Speaker be appointed so that both English and French Canada are represented.

Judiciary

Judges shall be appointed for at least 10 years. Provincial judges are to be appointed by the provincial governments and not by the federal government, although the appointments may be disallowed by the central government. The purpose of this is to eliminate political patronage by the federal government.

Distribution of Powers

O Hearn says that one of the chief objects of his book is to excise the idea of exclusive legislative jurisdiction from the federal structure. Exclusive jurisdiction imposes a restrictive and nonsensical rule of interpretation on the constitution. He would like to replace it with a scheme of dominant powers for each government. He lists dominant federal powers and dominant provincial powers but emphasizes that the chief purpose of the enumerated classes is not to grant powers but to define the cases where the legislature concerned is paramount. The federal paramount powers follow the BNA Act except that "Health and prevention of Disease" and "Welfare" are put under the federal sphere. This does not mean that the provinces are excluded from public welfare. On the other hand, "Marriage and Divorce," now under the federal sphere, are delegated to the provinces. No concurrent powers are listed because if the principle of paramountcy is strictly followed, it means, in effect, that

every power is concurrent. This may be more realistic but it could also create many problems.

Fiscal Powers & Institutions

In order to equalize revenues and responsibilities it is proposed that the federal and provincial governments impose taxation of any kind and by any system. It is proposed that the central government give subsidies to needy provinces. A Federal Council shall determine the rates of taxation and the amount allocated to each level of government. This Council shall be composed of one member from each province and delegates from the central government not exceeding in number the provincial delegates. The Council shall meet at the call of the Chairman or five delegates. Before any rates are determined, the majority of delegates from the Government and from the provinces, representing a majority of the population of Canada must concur.

Limits of Government

There are 25 articles which list such fundamental rights like the right of holding property, religious beliefs and employment. There shall be no preventive detention and all trials shall be speedy. Slavery is unlawful. Marriage shall be monogamous and for life and everybody has the right to marry and to have children. Everyone has the right of Education for at least 12 years at public expense. No law shall be enforceable until it has been published and made accessible to those subject to it. No law shall be made which offsets inequalities in age, sex or other social or economic conditions. However, Parliament may suspend all or any of these provisions in time of actual war for an ascertained period not exceeding one year.

Amendment of the Constitution

The Amendment procedure is uncomplicated. Any amendments to fundamental rights shall require ratification by the legislatures of all the provinces. All other articles may be changed by an Act of Parliament that is ratified by the legislatures of at least two thirds of the provinces representing three quarters of the population of Canada.

O Hearn's constitution is very flexible especially where dominion-provincial relations are concerned. Both responsibilities and revenues could be interpreted in different ways to suit different provinces. His method of electing senators seems to have considerable merit although it might meet opposition from Quebec.

St. Jean-Baptiste Society, "New Constitution for Canada."*

Canada will become a Confederation of two national states, English-Canada and Quebec, and each associated state will have all the powers wielded by a sovereign state. Thus, the government of Quebec will be the national government of all the citizens under its authority and every resident of Quebec will have Quebec citizenship.

The constitution will carefully enumerate the powers of the Confederation establishing the "confederal" state and administration. There will be an amendment procedure which shall protect the freedom of each associated state. French and English will be the two official, compulsory languages of the "confederal" state in all its bodies and in the exercise of all its legislative, executive and judicial powers.

The Canadian Confederation is given very few powers. There shall be a unicameral parliament called the "Confederation House", in which representatives from the two states will sit. These representatives will be elected by the national states. Every Bill will have to be approved by a majority of representatives from each associated state before it can become law. The governments of each associated state will form the Supreme Council of the Confederation and each government will assign an equal number of ministers to this Council.

*This proposal was submitted to Quebec's Legislative Committee on the Constitution by the Montreal branch of the St. Jean-Baptiste Society. It is published from the Commentator, September 1964. pp. 10-11.

The Supreme Council will be presided over alternately by the Prime Minister of each associated state. It's duties shall be: (i) to conduct the foreign policy of the Canadian Confederation; (ii) to create a Confederal Court to hear the cases in which the two associated states are directl or indirectly parties; (iii) to create all the permanent consultative and executive bodies that it needs in order to carry out its responsibilities; (iv) to choose the civil servants of the confederal administration; and finally (v) to establish collaboration between the two associated states in spheres of common interest such as economic planning, monetary policy, customs, continental transport, etcetera.

The state of Quebec will be a republic provided the voters vote for one at a referendum. The president of the Republic of Quebec will sign all the laws adopted by the Quebec parliament. Each state will be responsible for the administration of justice in its own territory. In order to promote unity in Quebec, a declaration shall be adopted that protects the individual rights of all Quebec citizens and ends discrimination.

The Anglo-Canadian nation will be free to delegate as much authority to the national government as it sees fit. The English provinces will continue to form a federation under the authority of the Ottawa government, although the number of provinces could be reduced.

Such a constitution will allow French Canadians to recognize and respect the nationalism of their Anglo-Canadian fellow citizens. On the other hand, it will "give up trying to make the circle square and admit that Quebec is the national state of the Quebecois".

SECTION B

PROBLEMS OF FEDERAL-PROVINCIAL RELATIONS: FINANCIAL, FISCAL AND ECONOMIC

Burns, R.M., Director, Institute of Intergovernmental Relations, Queen's University, "The Machinery of Federal-Provincial Relations."

Fulton, E.D., P.C. Member for Kamloops, B.C., "Some Financial Aspects of Canadian Federalism."

Gallant, Edgar, Director, Federal-Provincial Relations Branch, Dept. of Finance, Ottawa, "The Machinery of Federal-Provincial Relations."

Hood, W.C., Economic Advisor, Bank of Canada, "Economic Policy in Our Federal State."

MacKay, W.A., Faculty of Law, Dalhousie University, "Regional Interests and Policy in the Federal Structure."

R. M. Burns. "The Machinery of Federal-Provincial Relations."*

The purpose of this paper is to recommend four changes in existing federal-provincial machinery for consultation. These changes are based on the following three criticisms:

(1) Existing machinery does not provide for enough consultation on broad policy matters.

(2) There is no effective machinery for coordinating the work of the existing federal-provincial committees.

(3) The Continuing Committee on Fiscal and Economic matters does not have the degree of confidence, support and direction from the ministers involved which it should have in order to be an effective body for federal-provincial consultation.

Burns divides federal-provincial machinery for consultation into the following six groups:

(1) continuing inter-governmental contacts at department levels including ad hoc committees on particular problems.

(2) continuing committees in certain categorical areas

(3) the rather broader interests of the Federal-Provincial Continuing Committee on Fiscal and Economic Matters

(4) various ministerial gatherings

(5) Federal-Provincial Conferences themselves.

(6) Provincial Premiers' Conferences.

* Presented to the 17th Annual Conference, Institute of Public Administration of Canada, Winnipeg, September 11, 1965.

He then proceeds to criticize each of these groups in turn, concentrating criticism on groups 3, 4, 5 and 6.

While the meetings in section (1) and (2) have been on the whole successful there have been shortcomings in the broader financial and economic fields. This observation leads to Burns' theme which states that the key to inter-governmental cooperation is a more effective means of cooperation at the ministerial or policy level.

In particular, Burns feels that the Continuing Committee on Fiscal and Economic Matters is not as successful as it might be - except in areas where it has been specifically concerned with particular aspects of proposed or existing fiscal arrangements rather than the nebulous area of economic analysis and planning. Moreover, since 1957, its status has been reduced because:

(1) It has been in a policy vacuum.

(2) It lost some of the more positive personalities from its meetings.

(3) A hiatus developed between fiscal agreements and consequently demand on its energies fell off.

(4) The realization of its reduced status led to a loss in confidence and appreciation of all governments - not to mention the ministers directly involved. Burns cites this fourth reason as the most important one.

He therefore suggests that the Committee of Ministers of Finance and Provincial Treasurers could provide an effective background of policy interest in which their respective officials of the Continuing Committee could work more effectively than they have sometimes been able to do in the past.

Turning to the Federal-Provincial Plenary Conference, Burns notes the developing tendency of governmental representatives to seek agreements and make firm commitments in matters of policy which have not had the sanction of either Parliament or Provincial Legislatures. "This growing tendency towards 'summitry' will likely create more problems in the long run than it will in the short for in some cases I suspect the real will of the country could be easily overlooked or misinterpreted and a point of no return reached which was not generally acceptable."

As for the Conference of Provincial Premiers, Burns suggests that apart from providing a base for greater understanding, evidence available to the public shows that it has no great direct influence on the course of events.

In view of these criticisms Burns makes the following four recommendations:

(1) Replace the present Provincial Premiers' Conference with a conference consisting of the Prime Minister of Canada, the Provincial Premiers and a few advisors; this conference would have a limited agenda dealing with broad matters of policy which overlap jurisdictional bounds. This conference would meet at least annually.

(2) The existing Federal-Provincial Plenary Conference could continue for the more specific consideration of the larger problem of policy and where necessary matters could be 'hived off' to sub-conferences of ministers specifically concerned with the particular affair.

(3) The continuation of meetings of federal and provincial ministers is recommended in such fields as agriculture, welfare, health, resource development, finance etc., - supplemented by individual departmental communication.

(4) The Federal-Provincial Continuing Committee on Fiscal and Economic Matters should coordinate all the necessary committee meetings concerning the exchange of technical information and collaboration. These meetings themselves should go forward along the lines indicated by the ministerial group. In this connection Burns suggests that the Tax Structure Committee, after finishing its report, should become absorbed by the Committee of Finance Ministers and Provincial Treasurers and that it should act as a major coordinating body of all these committee meetings.

Four other incidental remarks are made in Burns' paper:

(1) Before developing methods of consultation, the principals must be willing to accept that co-operative federalism means the surrender of some degree of individual initiative and freedom of action in the common cause. (Burns p. 12)

(2) Burns suspects "that the people of Canada, with some voluble exceptions, are less concerned about constitutional rights than their political representatives and are more concerned in obtaining honest and effective government. (Burns p. 17)

(3) There are no strong arguments to support a permanent secretariat for Dominion-Provincial Conferences. The Department of Finance and the Privy Council office are capable of making administrative arrangements for these conferences. (Burns p. 15)

(4) The new Institute of Inter-Governmental Relations at Queen's University has an important role to play in the area of federal-provincial cooperation because its research will be more objective than research sponsored directly or indirectly by governments.

E.D. Fulton, "Some Financial
Aspects of Canadian Federalism"*

This paper suggests that a Constitutional Conference be held to reallocate revenues and responsibilities among the various levels of government. The purpose of the reallocation is to eliminate the current mismatching of revenues and responsibilities among government levels.

In 1867 the Constitution gave the federal government rights in both direct and indirect taxation. The provinces and municipalities were restricted to direct taxation and were held responsible for all "local undertakings". Today, "local undertakings" include problems which are national in scope and impact. The result is that provinces are burdened with heavy expenditures in education, welfare and maintenance but they do not have the revenue base with which to finance the required expenditures.

In order to get adequate revenue, provinces have built up a series of conventions whereby they get money from the federal government in the form of grants-in-aid, cost-sharing programs and loans. All these conventions lead to cooperative federalism.

The mismatching of revenues and responsibilities has created many problems. First, the provinces and the federal government are often forced into harsh competition within the various revenue fields open to them Direct provincial sales taxes are levied upon indirect federal sales taxes and excise taxes, and rivalry exists between rates for corporation and personal income taxes. Another major problem is the lack of coordination of provincial economic policies. There is a need for a concerted approach by both levels of government. The third problem is that of readjusting municipal finances to meet with present demands.

* This paper was presented at the Couchiching Conference. August 2. 1965.

The solution to these problems lies in a Constitutional Conference which will modernize the allocation of revenues and responsibilities.

Finally, careful attention must be given to the techniques of raising revenues so that the Canadian taxpayer is protected and not cheated.

Edgar Gallant, "The Machinery of Federal-Provincial Relations."*

The main purpose of this paper is to classify federal-provincial machinery using four criteria. No explicit theory on the choice of criteria is presented.

In his introduction, Gallant notes the growing interest in federal-provincial consultation. (From 1957 to 1965, the list of federal-provincial committee meetings has grown from 84 to 125). He then goes on to discuss the need for consultation, the nature of federal-provincial conferences and committees, and then he presents four classifications of these committees. He concludes that while individual programs have been on the whole successful, we need more committees to concentrate on the economic overview and on the co-ordination of the individual programs.

Need for Consultation

The need for federal-provincial consultation - which is particularly pronounced at the level of over all management of economic affairs - has arisen out of the following developments:

1. the expansion of the government sector as a whole and its importance for attaining Canada's social and economic objectives (e.g., 31% of G.N.P., in 1964, was spent by the government sector).

2. the present size and growth in provincial-municipal government expenditures relative to total expenditures. In 1964, provincial-municipal governments spent $8.1 billion whereas the federal government spent only $6.5 million (excluding inter-governmental transfers). Moreover in the last ten years provincial-municipal expenditures have grown by over 200% while federal government expenditure has grown by only 56%.

3. the high degree of overlapping jurisdiction in specific as well as overall government economic programs. The technical and vocational training programs, the financing of institutes of technical training

* Presented at the 17th Annual Conference Institute of Public Administration of Canada, Winnipeg, September 11, 1965.

and higher learning and rehabilitation of disabled persons are examples of specific programs. But overlapping jurisdiction exists even in overall economic programs. For example, programs of assistance to the unemployed form part of the automatic stabilization, in fiscal policy, traditionally regarded as being completely within the domain of the federal government. Moreover, as far as discretionary fiscal policy is concerned, "... an examination of the 1964 National Accounts shows that provincial and municipal government spent over $5.6 billion on goods and services in that year while the federal government spent about $3.0 billion. One could also note that expenditures of a capital nature, which are generally more susceptible to changes in timing, are estimated to be about five times as great at the provincial-municipal level as at the federal level. Clearly, there is more potential for implementing discretionary stabilization policies through the timing of purchases in the provincial-municipal sphere than in the federal." (Gallant, p. 6)

The Machinery for Federal-Provincial Relations

This section describes the nature of federal-provincial conferences and committees rather than the growing informal liaison involving such things as individual contacts between officials and between ministers by letter, telephone, or visits. Significant characteristics of federal-provincial committees are noted as follows:

(1) Federal-provincial machinery has evolved in the reverse order to that of inter-governmental liaison at the international level. In the latter, diplomatic missions and the network of intelligence concerned with the overview preceded the numerous committees and conferences at the specialist level. In the former the special committees have preceded the overview approach which is practically non-existent at the present time. It is interesting to note that Gallant regards the Plenary Conference of Premiers and Prime-Ministers as being largely concerned with specific policy issues.

(2) Historically, these specialized federal-provincial committees developed first in fields of concurrent jurisdiction such as agriculture and then spread to other fields.

(3) Part of federal-provincial machinery, inter-provincial and intra-provincial committees (e.g. cabinet committees, inter-departmental committees of officials and special federal-provincial relations divisions) is not designed primarily to coordinate activity between levels of government.

The Federal-Provincial Conferences and Committees

This section consists of four classifications of federal-provincial committees based respectively on four criteria. (1) the broad structure, (2) the participants, (3) the subject matter and (4) the broad purpose or type of consultation.

Classification (1) (Broad Structure)

It is difficult to ascertain what Gallant means by "broad structure" and he states that he is unsatisfied with the phrase himself. At the risk of interpreting rather than summarizing , the criterion appears to be the extent to which the structure rather than participants at the committee or conference provides powerful and direct representation of the governments concerned and hence the degree of the impact which the structure alone can make on ultimate legislation. The classification is presented as follows:

(1) Federal-Provincial Committees as such

Gallant estimates that there are approximately 100 of these. Examples are the Plenary Conference of Prime Ministers and Premiers, the Conference of the Ministers of Welfare, the Continuing Committee on Economic and Fiscal Matters, and the meeting of Federal and Provincial Directors of Vocational Education.

(2) Federal Advisory Councils

"Their composition is such, with representation from all provincial governments that they do, in effect, function as federal-provincial committees to a large extent." Examples include the Dominion Council of Health, the National Advisory Council on Rehabilitation of Disabled Persons, the Technical and Vocational Training Council and the National Council of Welfare.

(3) Quasi-Independent Associations

These function to some extent as professional organizations or special interest groups. Examples are the Canadian Council of Resource Ministers, the Canadian Association of Administrators of Labour Legislation, and the Association of Canadian Fire Marshals.

(4) Inter-Provincial Conferences

Examples are the Provincial Ministers of Mines Conference, Conference of Provincial Premiers, the Trade and Industry Council, and the Conference of Provincial Deputy Ministers of Public Works.

(5) Sub-Committees

Gallant estimates that there are about 30 of these. An example of these is the Committee on Technical and Vocational Training although it is considered to be subordinate to the Technical and Vocational Training Council, a federal advisory body.

(6) Provincial Advisory Committees

Examples are the Coordinating Committees on "Indian Affairs, and the Arda Joint Advisory Committee.

(7) Non-Government Associations

Examples are the Canadian Good Roads Association, and The Institute of Public Administration.

Classification (2) (The Participants)

This is an obvious classification although it involves arbitrary judgements about the level of meetings. Gallant produces the following table.

Level	No. of 1965 Conferences & Committees
Prime Ministers and Premiers	2
Ministers	13
Deputy Ministers	14
Directors	27
Professional and Technical	65

Classification (3) (Subject Matter)

Committees are grouped under headings of Agriculture, Finance, Health and Welfare.

Classification (4) (The Broad Purpose or Type of Consultations)

Gallant suggests the following spectrum of purposes: (1) Public Relations, (2) Professionalization, (3) Advancement of knowledge, (4) Humanization, (5) Coordination, (6) Persuasion, (7) Negotiation and Decision Making. Gallant notes that "many of the committees probably work at some or even most of these objectives at some time or another."

Conclusions

(1) In most, if not in each, of the individual program areas, consultation seems to have been reasonably effective.

(2) With so many individual programs, there is a danger of poor coordination.

(3) Lack of coordinated programs may preclude the attainment of Canada's basic economic objectives. Gallant thinks that the federal and provincial ministers of finance and provincial treasurers committee may be the one which facilitates consultation and coordination with regard to other areas of fiscal and economic management.

(4) "We need more frequent contacts among those who see the overall picture of federal-provincial relations" Gallant states that we have been moving towards this need and asks how far we shall continue to go in this direction.

Wm. C. Hood, "Economic Policy in Our Federal State."*

This paper examines some aspects of post war adaptations in economic policy which have been designed to meet Canada's broad economic objectives within the constraints imposed on that policy by the federal nature of our country. On the basis of the examination, Hood outlines some policy problems which the various levels of Canadian government will face in the future.

The paper comprises four sections (in addition to the introduction) respectively outlining the Canada we want, the constraints on economic policy, aspects of recent policy and policy problems ahead.

The Canada We Want

The most obvious point on which virtually all Canadians are agreed is that we want Canada to continue as a nation. Hood chooses the following three economic characteristics as being representative of a nation:

(1) the component parts of the federal state form what may be best described as a customs union

(2) the federal state has a national monetary system and policy, adequately supported by other policies

(3) in the federal state there exists a national dedication to the principle that common minimum standards of welfare and public services shall exist throughout the country and that provincial and federal governments shall cooperate in establishing such minimum standards and in sharing the resources required to meet them.

* Paper presented by Wm. C. Hood, University of Toronto at the Annual Meeting of the Canadian Political Science Association, Charlottetown, June 11, 1964.

He then proceeds to determine how Canada fits the description of an economic nation.

First, the existence of different sales taxes among provinces, and "buy Ontario and buy Quebec" programs do not detract seriously from the status of Canada as a nation. Secondly, notwithstanding the existence of provincially owned organizations operating under provincial law that issue modern money and that are savings banks, and the incomplete authority of the Federal government over interest, Canada meets the test of nationhood rather well in terms of having a national monetary policy. However, the important doubt as to our nationhood, in respect to monetary policy arises in connection with the supporting policies. Thirdly, two factors impinge on the achievement of minimum national standards, the desire to achieve other economic goals such as rapid economic growth and high employment and a lack of intergovernmental cooperation which curiously does not parallel cooperation between the government sectors as a whole and the private sector of the economy.

Constraints on Policy

Hood discusses two main constraints on policy making in Canada. One is imposed by regional disparities in economic welfare; the other is the constitutional constraint. With respect to regional disparities, Hood supports the status quo which calls for moderation in sharing among regions the costs and gains of economic progress. With respect to the second constraint he draws two observations. First, the change in the scene of the struggle between provincial and federal authorities from the

courts to the political arena (especially the federal-provincial conference) is a good thing. Secondly, the constraint of having to share powers between government levels is not wholly a misfortune. Sharing of powers may contribute to administrative efficiency, contribute to the ferment of ideas and experiment that are essential to economic growth and political maturity and broaden the opportunities for training politicians and administrators.

Aspects of Recent Policy

With the constraint of having to share powers between different levels of government we have marked out solutions to economic policy problems in recent years against a backdrop characterized by two dominant features, the growth of government and government responsibility taken as a whole, and the ascendancy of provincial and municipal governments relative to the federal government.

The post war rise of provincial power is due to the following:

(1) the lapsing of the war-time emergency powers of the federal government and a reaction to the consequences of their exercise.

(2) the exploitation of national resources in the early 1950's which brought general prosperity and with it a vastly enlarged demand for highways, education, urban services and social services generally together with the fact that responsibilities of these programs devolve primarily upon provincial governments.

(3) lack of sensitivity of the federal parliament to needs of urban unemployment and growth. Hood attributes this lack of sensitivity to overweighted rural representation in federal parliament although he notes that there is some over-representation of rural population in Provincial parliaments.

(4) The emergence of a minority government in the federal parliament.

(5) the strengthening of the position of Quebec relative to the federal authority which Hood thinks led other provincesto increase their demands for power and resources, or forced the federal authority to yield power and resources to them.

All these centrifugal forces have overpowered the centripetal forces as reflected in a revival of economic nationalism in the 1950's.

Against the background of these two sets of forces, the federal-provincial fiscal arrangements have proceeded from a system of tax-rentals with population-related compensation, to a tax-sharing system supplemented by collection agreements and equalization grants (based on fiscal capacity rather than fiscal need). In addition there has been a continuing increase in conditional grants to the provinces as part of "shared-cost" programs. Through these arrangements, there has been a considerable restoration to the provinces of revenues from the taxation of income and estates (not to mention other specific tax fields given up by the federal government).

Moreover, all provinces have resumed the levying of personal and corporation income taxes and all are free to levy succession duties. In the course of the evolution of arrangements, the isolation of Quebec from the rest of provinces has been reduced. All these conclusions are based on an excellent detailed description of federal-provincial fiscal arrangements in the period since the war.

Hood feels that the future importance of the shared-cost programs will decline because of larger revenues accruing to provincial governments from federal-provincial agreements and in particular from the Canada Pension Plan. The Canada Pension Plan by virtue of its funded character, adds a new dimension to economic policy-making in this country and sharpens the policy problems ahead already posed by the other fiscal arrangements we have been making.

Policy Problems Ahead

Anti-recessionary fiscal power is now less capable of providing support for monetary policy than at any time since the war because the provinces have so strategic a role in both tax and expenditure policy by virtue of the relative weights of their budgets and of the fact that much of the initiative for changes rests with them. Moreover, there is now no assurance that if the federal government sought to support monetary policy with a cut in the personal income tax, the provinces, who now all have income tax laws of their own, would not render the federal cut nugatory by raising their own rates. Therefore, without the necessary will and machinery for inter-governmental coordination, decentralization will present us with a

considerable problem of inflation which may paradoxically bring with it significant unemployment born of high costs.

Turning to the Canada Pension Plan, Hood feels that it will effect a significant increase in saving. For two reasons this saving should be directed to investment in human and physical capital which will yield increases in productivity. First, increments in productivity will raise the material standard of living of Canadians. Secondly, since the Canada Pension Plan will result in a reduction in the accumulation of large blocks of capital in the private sector, blocks of capital which are essential to productivity growth, investment by the government in productive enterprises is necessary in order to replace the decline in the private sector. Hood, however, does not think that provincial governments are yet geared to make the capital investment decisions which they are soon going to be faced with under the Canada Pension Plan and under other policies serving to enlarge the role of government in capital formation.

Another problem facing Canada as a whole is that a more liberal old age security program than that of our American neighbours with its consequent increase in tax burden will deteriorate Canada's competitive position. As a result we may thus experience a condition of inflation combined with unemployed resources attached to some industries.

Hood's main conclusion is that unless we improve the machinery for appraising and affecting economic development at the provincial level and coordinating provincial polices with federal policies, our defences against both unemployment and inflation will not be strong enough.

W. A. MacKay, "Regional Interests and Policy in the Federal Structure."*

The purpose of this paper is to describe and analyze the opportunities which provinces,or representatives of provinces, have to influence federal policies.

MacKay concludes that the approach to complex problems of regional development depends, today, more on the initiative of the skilled public servant than on the elected politician and that the assessment of regional interests is made in the administrative or executive rather than the legislative and judicial branches of the Federal government.

The theory that the legislative and judicial branches of government are the guardians of regional interests is hopelessly outmoded. The party system, the representative senate, the House of Commons, and the federal Cabinet have failed to provide a forum for the assessment of provincial interests. The importance of the federal executive's (i.e. the federal cabinet's) representation of regional interests has declined since the era of two-party domination in the House, when government intervention was the exception rather than the expected remedy for social and economic problems. Today Parliament does not effectively serve regional interests.

In Canada there is almost a total reliance on provincial courts for dispensing with problems involving both federal and provincial law. However, regional viewpoints are rarely expressed in the courts because most judicial decisions concern private rather than constitutional issues. Moreover, MacKay feels that the Supreme Court of Canada has discriminated against Quebec because the common law system in other provinces is different from the Quebec Civil Code. Thus provincial courts are more or less ineffective institutions in influencing the federal government on behalf of provincial interests.

Regional interests have, thus, been represented by public servants in

*Presented at the Conference of the Learned Societies, Vancouver, June 1965

different areas. Several steps have been taken by the federal government to include regional personnel in formulating federal policies:

(1) The Civil Service Act provides that the federal administrative offices across the country be staffed by local people.

(2) The Motor Vehicle Transport Act permits provincial authorities to license interprovincial carriers.

(3) The Agricultural Products Market Act authorizes local boards to regulate all aspects of trade in agricultural products important to the province.

(4) The Government Employees Compensation Act authorizes provincial boards to give awards to federal employees injured on duty.

(5) Provincial officers have been appointed game officers and given control to license fisheries.

(6) Provinces can impose prohibitions on the export of game or the sale of liquor, both of which are under federal control.

Boards and agencies set up by the federal government endeavour to have regional representation in their personnel. For example, the Electoral Boundaries Readjustment Act, the Atlantic Development Board Act, the ARDA organization and the Economic Council provide for regional representation. MacKay suggests that one of the reasons for this is that the federal administration does not have within itself appropriate means for assessing regional interests and determining regional policy.

Provincial responsibility in tax collection has increased, and provincial governments have taken the initiative in shaping federal policies both in fiscal arrangements and in the shared-cost programs. Provincial viewpoints are also expressed through meetings of prime ministers and national councils.

The provinces are becoming increasingly important in the formulation of federal policy applicable to regions of the country. This is desirable because regional policy is best when it responds to local interests and sensitiveness.